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SUPREME COURT OF THE UNITED STATES

October Term, 1938

No. 467

GEORGE W. [illegible], APPELLANT, UNITED STATES
[illegible] [illegible] PENNSYLVANIA,
APPELLEE.

APPEAL FROM THE [illegible]

FILED [illegible], 1938

SUPREME COURT OF THE UNITED STATES

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. .....

WILLIAM H. HIATT, Warden, United States Penitentiary, Lewisburg, Pennsylvania,
PETITIONER,

vs.

BERNARD W. SMITH.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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In the United States District Court
for the Middle District of Pennsylvania

Habeas Corpus Docket, H.C. No. 199

Title of Case	*Attorneys*
In the Matter of The Application for a Writ of Habeas Corpus by Bernard W. Smith.	*For Petitioner:* Daniel F. Mathews, Esq. 913-919 University Bldg. Syracuse 2, N. Y. Frank J. McDonnell 403-405 Lincoln Trust Bldg. Scranton 3, Penna. *For Respondent:* Arthur A. Maguire, Esq. U. S. Attorney, Scranton Maj. Thayer Chapman, USA. Judge Advocate General's Office, Washington, D. C.

Docket Entries

1947	(FVF)
Jan. 2	Petition for Writ of Habeas Corpus.
Jan. 2	Order by Judge Follmer granting leave to Daniel F. Mathews, Esq. to enter his special appearance as counsel for the petitioner.
Jan. 27	Rule to Show Cause, returnable Feb. 7, 1947. Hearing on Response and Petition to be held Feb. 11, 1947, 10:00 a. m. at Lewisburg, Penna. Copies mailed counsel, Warden Hiatt, and U. S. Attorney.
Jan. 28	Response to Rule to Show Cause.
Feb. 4	Order of court to produce petitioner at hearing Feb. 11. Copies to counsel, Warden Hiatt, and U. S. Attorney.
Feb. 11	Hearing at Lewisburg, Penna.—Witness List.
April 14	Praecipe for entry of appearance by Frank J. McDonnell, Esq. 403-405 Lincoln Trust Bldg. Scranton 3, Pa. (Copy to U. S. Attorney).

June	1	Transcript of Hearing 2 11 4 Before Follmer, Judge, and Govt. Exhibit No. 1 (Photostatic copy of General Court Martial of Bernard W. Smith), and Govt. Exhibit No. 2 (copy of W.D.A.G.O. Form 170 pertaining to appointment and statement of Preferences for Reserve Officers Harry Lieberman 0-1551068).
Aug.	7	Opinion of Judge Follmer denying petition for writ and dismissing rule to show cause. (Copies of opinion mailed attorneys of record for petitioner and respondent, copy to Warden Hiatt, U. S. Attorney General.)
Aug.	7	JS6 card to Scranton.
Sept.	8	Notice of Appeal (Copy mailed to U. S. Attorney, and Maj. Thayer Chapman by petitioner's attorney). Copy mailed Circuit Court of Appeals by Clerk.
Nov.	22	Request for transmittal of record to Circuit Court of Appeals. (By petitioner)
Dec.	9	Designation of Record filed by U. S. Attorney (Copies being mailed to petitioner, and Maj. Chapman)
Dec.	9	Petition for order Under CCA-3, 5(i) Appendix.
Dec.	10	Order of Court directing original files be transmitted to Circuit Court of Appeals. (Copies mailed counsel of record)

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United States District Court
for the Middle District of Pennsylvania.

In the Matter of the Application for a Writ of
Habeas Corpus
by
BERNARD W. SMITH.

Petition for Writ of Habeas Corpus—Filed Jan. 2, 1947.

To Honorable Frederick J. Follmer, United States District Judge:

The petition of Bernard W. Smith respectfully shows to the Court:

1. That the petitioner is confined in the United States Penitentiary at Lewisburg, Pa.; that Lewisburg is within the confines of the Middle District of Pennsylvania.

2. That the petitioner herein is being presently incarcerated in said penitentiary which is under the control of William H. Hiatt, Warden of said institution, and one of the

deputy wardens and or the Secretary of War, or whoever may be in charge of the War Department.

3. That the petitioner is presently being restrained of his liberty.

4. That the petitioner is presently incarcerated pursuant to a conviction under a general courts-martial, which courts-martial was held in England in 1944.

5. That the petitioner is presently confined in the United States Penitentiary at Lewisburg, Pa. pursuant to an order made September 20, 1944, by Brigadier General Francis H. Griswold of the U. S. Army, who was the commanding general of the 8th Fighter Command at AAF Station, F-341, APO 637.

6. That the petitioner herein was convicted of a violation of the 92nd Article of War, Rape; and the 93rd Article of War, attempted rape, which crimes were alleged to have been committed on July 11, 1944, at Lawford, Essex, England.

7. That a copy of the record and transcript of the certificate of conviction are now in the possession of the Secretary of War or the Judge Advocate General's Office of the U. S. Army, together with all other pertinent records and documents in connection with this trial. Therefore the petitioner is unable to provide the Court with the necessary documentary evidence in the form of the record of trial, transcript of the minutes, certificate of con-
3 viction, etc.

8. That no previous application has been made for a writ of habeas corpus by the petitioner herein.

9. That the grounds for the petitioner's prayer for a writ of habeas corpus are as follows:

I. That the petitioner was denied his rights to due process of law as provided by the United States Constitution in that:

(a) The petitioner conclusively proved that he was in the army camp 15 minutes to half hour prior to the time that the complaint Sheila Dale (rape case) claimed he ravished her.

(b) The conviction in the case of Sheila Dale was on the uncorroborated testimony of Sheila Dale herself and was against the weight of evidence.

(c) That the crime of rape as defined in the Manual of Courts-Martial was not proven on the trial as a matter of law.

(d) The identification parade, wherein the petitioner was claimed to have been identified by the com-

plainants; was not conducted fairly and was in fact a fraud.

(e) Neither the Judge Advocate General who was the prosecuting attorney nor the Court called a certain Mrs. Kerry, who was an important witness to both the prosecution and the defense, and which witness could have completely exonerated the defendant had she been called.

(f) That the pre-trial investigating officer's report did not describe a *prima facie* case of rape or attempted rape in accordance with the Manual of Courts-Martial or Articles of War.

II. That the petitioner was not advised of his rights pursuant to the provisions of the 24th Article of War at the time he was first questioned by Lt. Todd.

III. That Lt. Todd was the accuser in fact and the original investigator of the alleged crime and later he was appointed as impartial investigator under the 70th Article of War. Lt. Todd, being the originator of the charges and the accuser in fact, was ineligible to be the impartial investigator under the 70th Article of War.

4 IV. That the investigation under the 70th Article of War was neither thorough nor impartial and further said investigation was not competently made.

V. That the petitioner was inadequately represented by counsel on said trial.

VI. That errors were committed in the course of the trial which were highly prejudicial to the defendant in that:

(a) Improper evidence was admitted.

(b) The prosecution was represented by skilled lawyers, members of the Judge Advocate General's Staff, and the petitioner was represented by a lay person, who was not familiar with legal procedure. As a result thereof, leading questions were propounded to the prosecution witnesses, which were incompetent and illegal.

(c) That incompetent evidence which was not connected up to the case at bar was admitted into evidence, which was error; the lay witnesses were permitted to testify to facts which required expert witnesses, and that expert witnesses were available.

(d) That army records of great value to the conduct of the defendant's case were not admitted into evidence, first due to the Court's error, and secondly due to counsel's incompetence.

VII. That due to inadequate representation of the petitioner in the trial no mention was made in the record concerning wide discrepancies of the prosecution witnesses, to wit:

(a) That an identification mark, a cut, was set forth in a statement by one of the complainants to be on the right hand, when in fact, there was a cut on the left hand.

(b) That the appearance of a cut and a dental impression would not be the same.

(c) That the prosecution attorneys as a matter of fact testified themselves by means of leading questions rather than permit Constable Felton to describe the laceration.

VIII. That the crime of rape was never proven.

IX. That the reviewing authorities erred in approving the sentence as a matter of law.

X. That the evidence contained in the case as a matter of law was insufficient to support the conviction and therefore the Court lost jurisdiction.

XI. The evidence was not sufficient as a matter of law to find the defendant guilty beyond a reasonable doubt and therefore the Courts-Martial lost jurisdiction.

XII. On the errors of law herein set forth and the errors of fact which amount to errors of law, and on the ground of the accumulation of errors in said trial, the petitioner was denied due process of law.

XIII. That as a result of the proceedings set forth herein the defendant's constitutional rights were denied to such an extent that the Court lost jurisdiction.

WHEREFORE, the petitioner prays that a writ of habeas corpus issue requiring the Secretary of War, Robert Patterson, and/or the Assistant Secretary of War and/or William H. Hiatt, Warden of the United States Penitentiary at Lewisburg, Pa., or the person who may be in charge of said penitentiary, to produce the body of the petitioner herein before Honorable Frederick V. Follmer, United States District Judge for the Middle District of Pennsylvania, and also produce all records, documents and reports pertaining to the conviction of the petitioner herein; and

The petitioner further prays that a writ of habeas corpus issue.

BERNARD W. SMITH,
Petitioner.

6

State of Pennsylvania,
County of Union. } ss.:

BERNARD W. SMITH, the petitioner named in the foregoing petition, being duly sworn, deposes and says: That he has heard said petition read and knows the contents thereof, and that the same is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

BERNARD W. SMITH.

Sworn to before me this 24th day of December, 1946.

WM. H. HIATT,
"*Warden*—Authorized by the Act of February 11, 1938, to administer oaths."

8 In the District Court of the United States
For the Middle District of Pennsylvania
(Title Omitted)

Rule to Show Cause—Filed Jan. 27, 1947

Now, to wit, January 27, 1947, upon consideration of the Petition filed in this cause, Rule is hereby granted upon William H. Hiatt, Warden, United States Penitentiary, Lewisburg, Pa., to show cause why a Writ of Habeas Corpus should not be granted.

Rule returnable February 7, 1947.

Hearing on the Petition and Response to be held on February 11, 1947, 10:00 o'clock A. M., at Lewisburg, Pennsylvania.

FREDERICK V. FOLLMER,
United States District Judge

10 In the United States District Court.
For the Middle District of Pennsylvania
(Title Omitted)

Response to Rule to Show Cause—Filed Jan. 28, 1947

Comes now the respondent, William H. Hiatt, Warden of the United States Penitentiary, Lewisburg, Pennsylvania, by Arthur A. Maguire, United States Attorney in and for the Middle District of Pennsylvania and makes answer to the petition and the rule to show cause herein.

I. Respondent admits the allegations contained in paragraphs 1, 2, 3, 4, 6, and 7 of the petition herein.

II. Respondent denies the allegations contained in paragraph 5 of the petition and alleges that petitioner is pres-

ently confined in the United States Penitentiary, Lewisburg, Pennsylvania, under the following facts and circumstances:

a. That the said Bernard W. Smith was duly enlisted as a soldier in the service of the United States on May 2, 1942, to serve for the duration of the war and six (6) months.

b. That on July 11, 1944, at Fawford, Essex, England, Bernard W. Smith forcibly and feloniously, against her will, had carnal knowledge of Sheila W. Dale and, with intent to commit a felony, viz, rape, committed an assault upon Miriam F. Cullum.

c. That the said Bernard W. Smith was duly arraigned for said offenses before a general court-martial, convened by Special Orders Number 195, dated 9 August 1944, Headquarters, VIII Fighter Command, AAF Station F-341, was convicted thereof by the said court and sentenced thereby to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for the term of his natural life, which sentence was duly approved on September 20, 1944, by the officer ordering the court as required by Article of War 46. The record of trial was duly examined by the Board of Review, Branch Office of The Judge Advocate General with the European Theater of Operations and found to be legally sufficient to support the findings and sentence, which opinion was concurred in by the Assistant Judge Advocate General, European Theater of Operations, who authorized the promulgation of an order executing the sentence, all as required by Article of War 50½. On March 26, 1946, by order of the Secretary of War, petitioner's sentence was commuted to sixteen (16) years.

III. Respondent denies that he has any knowledge or information sufficient to form a belief with respect to the allegations contained in paragraph 8 of the petition.

IV. As to any alleged errors committed at the trial in respect of the admission or exclusion of testimony, the weight and sufficiency of the evidence, any conflicts in the testimony, the credibility of the witnesses and the conduct of court or counsel, respondent avers that these are matters which this court on habeas corpus, under the law, may not inquire into. Subject to this objection, respondent makes the averments contained in paragraphs V, VI, VII, VIII, IX, X and XI hereof.

V. Respondent denies the allegations contained in paragraphs 9, I(a), 9, I(b), 9, I(c), 9, I(d), 9, I(e), 9, I(f) and 9, II of the petition.

VI. Respondent denies the allegations contained in paragraph 9, III of the petition and alleges that Lieutenant Todd did not conduct the preliminary investigation which was conducted by agents of the Criminal Investigation Division.

12 VII. Respondent denies the allegations contained in paragraph 9, IV of the petition and alleges that a pre-trial investigation was regularly, impartially, competently and completely conducted, complying in all respects with the pertinent provisions of Article of War 70; that petitioner was confronted with the witnesses against him, was afforded the opportunity of cross-examination and was allowed to call witnesses on his own behalf.

VIII. Respondent denies the allegations contained in paragraph 9, V of the petition and alleges that the petitioner was ably and competently defended by the regularly appointed defense counsel and assistant defense counsel as well as by special counsel of his own choice, a lawyer with ten years' experience.

IX. Respondent denies the allegations contained in paragraphs 9, VI(a), 9, VI(b), 9, VI(c), 9, VI(d), 9, VII(a), 9, VII(b) and 9, VII (c) of the petition.

X. Respondent denies the allegations contained in paragraph 9, VIII of the petition and alleges that all of the elements constituting the offense of rape were proven by the prosecution including penetration, force, and want of consent on the part of the complainant Sheila W. Dale.

XII. Respondent denies the allegations contained in paragraphs 9, IX, 9, X, 9, XI, 9, XII, and 9, XIII of the petition and affirmatively alleges that the sentence which petitioner is now serving in the United States Penitentiary, Lewisburg, Pennsylvania is lawful and valid; that the court-martial which tried and convicted the petitioner was duly and lawfully constituted and had jurisdiction over the petitioner as the accused and over the subject matter of said cause; the conduct of said trial was regular and lawful and none of the constitutional rights of petitioner were violated during or in connection with the said trial.

WHEREFORE, your respondent respectfully prays that the petition in this proceeding be dismissed at petitioner's costs.

DATED January 28, 1947.

WILLIAM H. HYATT
Warden, United States Penitentiary
Lewisburg, Pennsylvania
By: ARTHUR A. MAGUIRE

13

United States of America
Middle District of Pennsylvania ss.:

W. H. Hiatt, Warden, being duly sworn according to law deposes and says that the facts set forth in the foregoing Response are true and correct to the best of his knowledge, information and belief.

W. H. Hiatt, Warden

Sworn and subscribed to before me this 28th day of January, 1947.

J. E. Thomas
Associate Warden—Authorized by the Act of February 11, 1938, to administer oath.

(SEAL)

14 In the District Court of the United States
For the Middle District of Pennsylvania

(Title Omitted)

Order of Court to Produce Petitioner—Feb. 4, 1947

Now, to wit, February 4, 1947, William H. Hiatt, Warden, United States Penitentiary, Lewisburg, Pennsylvania, is hereby ordered to produce Bernard W. Smith, petitioner, for hearing on the Petition and Response to be held on February 11, 1947, 10:00 o'clock A. M., at Lewisburg, Penna.

Frederick V. Follmer
United States District Judge

15 United States District Court in and for the Middle District of Pennsylvania.

In the Matter of
Application for Writ of Habeas Corpus

Bernard W. Smith
vs.
William H. Hiatt, Warden

Transcript of Evidence—February 11, 1947

Cause came on to be heard before Hon. Frederick V. Follmer, District Judge, at Lewisburg, Pennsylvania, on February 11th, 1947.

APPEARANCES:

Daniel F. Matthews, Esq., Syracuse, New York, for the Petitioner.

Major Thayer Chapman, Judge Advocate General's Office, Washington, D. C.

John M. Bain, Reporter, Northumberland, Penna.

16 By Mr. MATTHEWS. Inadvertently, your Honor, I have not complied with the rules as regarding local Counsel. May I be permitted to proceed with the understanding that I provide Local Counsel?

By the COURT. That is all right.

By Mr. MATTHEWS. We desire to ask, your Honor, if the Government has offered a certified copy of the trial?

By Major CHAPMAN. A certified copy will be offered.

BERNARD W. SMITH, the Petitioner, called and sworn on his own behalf, on direct and cross examination testified as follows:

By the COURT. It might be well to have an understanding as to the jurisdiction of the Court. We are not concerned with the guilt or the innocence of this Defendant, but we are interested in the question of whether or not he was deprived of any of his constitutional rights.

By Mr. MATTHEWS: If it please the Court, I have a rather labored brief on the facts, as well as the law and in accordance with the petition, which I previously had issued, and the answer which was filed—there are some ques-
17 tions which I will have to dispute by evidence. It is our contention that as a matter of law the Court has jurisdiction on several grounds. The first ground—it is all based on due process of law as set forth in the Constitution.

In the first instance it is our contention that Lieutenant Todd was the original investigator in this case, or one of the original investigators; that subsequently he was appointed a "Thorough and impartial investigator". We contend that the investigation was neither through nor was it impartial. I want to show by some evidence this morning that there was and had been trouble between Lieutenant Todd and this particular soldier previously; I want to show that certain witnesses, who were of vital importance, were not called which rendered the "thorough and impartial investigation" which may have been so named but was not so in fact. I want to show that when he was first interviewed he was not

advised of his rights under the Articles of War. I want to show in addition to that, that there were many errors of law in the course of the trial which were fundamental and which deprived him of his rights and that, as a result of the accumulation of these errors he was in fact denied due process of law. I want to show that the verdict was grossly against the weight of the evidence. I want to show that the reviewing authorities who reviewed this case erred in that they started from a presumption that the Defendant was guilty and then worked backwards seeking to justify the conclusion thus reached.

I have set forth a number of other points in my brief all of which go to the law to give the Court jurisdiction. That is my broad contention. I don't intend to elicit very much evidence.

18 By the Court. Go ahead.

By Mr. Matthews.

Q. You are the Defendant in this case and presently incarcerated in the Lewisburg Penitentiary?

A. Yes, sir.

Q. Your name is Bernard W. Smith?

A. Yes, sir.

Q. Now, you were in England?

A. Yes, sir.

Q. Did you know Lieutenant Todd prior to the time of the episode which resulted in your present conviction?

A. Yes; I was called before him once before that.

Q. Will you state the facts in connection with your previous contacts with Lieutenant Todd?

By Major Chapman. Objected to as irrelevant and immaterial and having no bearing on this matter whatsoever.

By the Court. What is the purpose?

By Mr. Matthews. I want to show, your Honor, that there was actual prejudice on the part of Lieutenant Todd. I want to show that Lieutenant Todd was not only one of the original investigators, but that Lieutenant Todd made statements to this Defendant previously that showed animosity, and that before this case appeared before

19 Lieutenant Todd there was prejudice which would affect his activities as a through and impartial investigating officer.

By the Court. I think we might be interested in going into what happened; as far as any conclusions that this witness might draw.

By Mr. Matthews. I intend to restrict my questions to telling what happened, your Honor.

By the Court. I will overrule the objection and note a exception for the Respondent.

By Mr. Matthews.

Q. Will you state just what happened between yourself and Lieutenant Todd, a short time prior to July 11th, 1944?

A. Some three months previous I was called before Lieutenant Todd. He told me at that time he was investigating the theft of some Army funds and that I was a suspect, and at that time he informed me of my rights and said he wished to ask me a few questions. There was another Lieutenant present. He asked me several questions in connection with this money which I flatly denied.

Q. By that you mean that you had no knowledge of any theft?

A. No, sir, I had no knowledge until that that any money had been taken from the Commanding Officer. He asked me several questions and they kept getting stronger and stronger and I flatly denied it, and he told me flatly to my face that he felt certain that I was the man who had taken the money and he said that while he did not have the proof that he would get the proof, and it became a very heated argument—

By Major Chapman. Objected to, your Honor.

By the Court. Strike it out. State what was said.

A. I informed Lieutenant Todd that if he had any satisfaction that I had committed any offense what he should do was to charge me with it and have the Commanding Officer determine whether I should be tried. He said "I have no evidence at this time that you have taken this money except my own belief and in the event I do get this evidence I will see that you are fully prosecented for it" and he warned me at that time that I had better walk the straight and narrow or I would get myself into deep water. That was the substance of the conversation as near as I can remember it.

Q. Did Lieutenant Todd say to you in words, or in substance, that he believed that you were the guilty party at that time?

A. Yes, sir.

Q. Did he further require you to account for any money you had on your person, or any place, at that time?

By Major Chapman. If the Court please we object to the manner of that question.

By Mr. MATTHEWS. I am trying to refresh his recollection as to the facts he has previously given me.

21 By Major CHAPMAN. If the Court please, I move to strike out this testimony by Counsel.

By Mr. MATTHEWS. I am attempting to refresh the witness's recollection of a previous statement to me.

By the COURT. Go ahead with the witness.

By Mr. MATTHEWS.

Q. Was anything said during that conversation concerning any money that you had?

A. Yes, sir, he asked me how much I had drawn on the previous pay day and he asked me how much money I had, and whether I had won any in gambling, and particularly how much money I had expended since pay day, and I accounted for all that.

Q. Now, do you remember July 17th, 1944?

A. Yes, sir, I do.

Q. What happened on that day? Were you summoned to go somewhere; did there come a time when you had a conversation with Lieutenant Todd concerning the case at Bar?

A. I am confused with the dates; I believe it was the 18th.

Q. On that day did there come a time when someone directed you to appear at a certain place?

A. Yes, sir.

Q. Who directed you to so appear?

A. My First Sergeant came to my Barracks about 3:00 o'clock in the afternoon and directed me to report to

22 the Commanding Officer in the Orderly Room, who was Captain MacGregor.

Q. Did you report?

A. Yes, sir.

Q. Were you directed to do something else?

A. Yes, sir. Captain MacGregor told me that he had been ordered by an officer on the Staff to take me to Lieutenant Todd's office, that they wanted to see me up there.

Q. Where was Lieutenant Todd's office?

A. A distance of approximately a quarter, or maybe a half, a mile.

Q. Where was it located?

A. At the Guard House.

Q. Did you go there with Captain MacGregor?

A. Yes, sir.

Q. When you went there with Captain MacGregor did you enter Lieutenant Todd's office?

A. No, sir; as we entered the Guard House Captain MacGregor spoke to the Officer of the Guard and said he wanted to see Lieutenant Todd and I was asked to wait in the Guard Room.

Q. Subsequently were you summoned into the room?

A. Yes, sir.

Q. Who were present?

A. Lieutenant Todd, at his desk, and two British Constables, and Captain MacGregor.

Q. And were you question?

A. Yes, sir.

Q. How long were you questioned?

A. For approximately two hours.

23 Q. Was that the first time you were ever questioned in the case at Bar?

A. Yes, sir.

Q. Who did the questioning?

A. The questioning was started by Lieutenant Todd, and one of the British Constables, who was Mr. Felton, broke in on the questioning.

Q. State what you said and what Lieutenant Todd said.

A. I asked Lieutenant Todd if this was in connection with the theft in the 351 Day Room.

Q. What did he say?

A. He never answered that question. He stated I would be informed what it was all about in due time and to answer the questions that were put to me.

Q. Did you proceed to answer the questions?

A. Yes, sir; I did.

Q. And you say that questions were put by the British Constable as well as by Lieutenant Todd?

A. Yes, sir.

Q. Did Captain MacGregor participate in the questioning?

A. He might have asked a couple of questions.

Q. Did there finally come a time when any protest was made?

A. I protested at one time.

Q. State what you said and who you said it to?

A. This Constable Felton grabbed my left hand and twisted my arm and pulled it over and I was struggling with him. I was seated in a natural position with my arms folded across. Constable Felton grabbed my hand and

said "I want to see that hand". I refused and told Lieutenant Todd I didn't want this man mauling me all over and Lieutenant Todd told me to show my hand and cooperate with the Constable or he would lock me up.

Q. Did you show your hand?

A. Yes, sir.

Q. Did you have any laceration on your hand?

A. Yes, sir.

Q. Where was it?

A. At the base of the thumb.

Q. Was there more than one laceration on that hand?

A. One laceration, Sir.

Q. Is the scar on your hand at the present time?

A. Yes, sir, it is.

Q. Will you describe to the Court the nature of the cut and the extent of the cut, or laceration?

A. It was cut and bruised along with the cut; it was inflicted by a clever which was rather dull.

Q. How long was it?

A. At that time it was practically an inch to an inch and a half long.

Q. Was the cut straight?

A. Yes, sir.

Q. Does the scar reveal the cut at the present time?

A. Yes, sir.

Q. Was there any cut on the opposite side of your thumb?

A. No, sir, none whatsoever.

Q. Now, at the time the Constable twisted your
25 hand, did Lieutenant Todd say anything to you, anything further than you have testified?

A. He gave me direct orders to answer the questions and cooperate with the British Constables; he said "I have had trouble with you before, Smith, and I don't intend to have any in this case" and he said "If you don't want to cooperate I will lock you up in the Guard House."

Q. Was Captain MacGregor there?

A. Yes, sir.

Q. Did you say anything to Captain MacGregor?

A. Yes, sir; I protested that I had not been informed of my rights and that this questioning was entirely out of order and that I had been called in previously on this matter and that I had answered the questions at that time.

Q. What did Captain MacGregor say?

A. Captain MacGregor directed me to cooperate with Lieutenant Todd

Q. Did there come a time, subsequently, that evening, when you were directed to stand in a line up?

A. Yes, sir.

Q. Where did the line up take place?

A. Right in front of the Guard House.

Q. About what time did it take place?

A. Approximately 7:00 o'clock in the evening.

Q. Up to that time had you been advised of any crime that was being investigated?

A. No, sir.

Q. Had you been informed that you were implicated in any way in a violation of the Military Law whatsoever?

26

A. No, sir.

Q. Now, will you go on and describe what happened in the line-up; who were present when you were brought out of the Guard House?

A. There were the British Constables, Felton and another one, and Lieutenant Todd, and I believe Captain MacGregor was there, and I believe the Adjutant of the Station was there and there were two or three men there in civilian clothes whom I later determined were from the C. I. D. Later, after the line-up, I learned they were C. I. D. men.

Q. Were you put in the line-up?

A. I was told to take a place in the line among some fifteen men. One of the men in civilian clothes directed me to take a place in the line.

Q. Did you?

A. Yes, sir.

Q. Which way were you facing?

A. Facing the Guard House.

Q. Did there come a time when you saw the girls or either of the girls, or both of them?

By Major CHAPMAN. What girls?

By Mr. MATTHEWS. The two Complainants.

A. Yes, sir.

Q. Did they come out one at a time?

27

A. Yes, sir.

Q. Now, where were the girls and where did they come from when you first saw them?

A. We were given an "about face" and these girls were brought out and I didn't see either of the girls until they came up in front of the line up.

Q. You mean to say you were standing there first facel away from the Guard House?

A. No, sir, we were facing the Guard House when I was told to take my place and were given a command "about face" and we stood at parade rest.

Q. Previously you had been facing the Guard House?

A. Yes, sir.

Q. Where did the girls come from?

A. There was a short hallway and Lieutenant Todd's office was off to the right. There were two windows facing out of Lieutenant Todd's office in the direction the line up was being conducted.

Q. How did those windows swing?

A. They were closed at the bottom, and I would say roughly about five feet from the floor they had a transom that swung out and this transom had a bar on it so it opened parallel.

Q. Was it a transom or part of the window?

A. It was part of the window built in; that would open.

Q. The window swung out from the top rather than swung out from the bottom?

A. Yes, sir.

Q. Could anyone standing inside of the room see out through that window?

28 By Major Chapman. Objected to as asking for a conclusion.

By Mr. Matthews.

Q. Do you know?

A. Yes, sir.

Q. You say the two girls were in this office; do you know who was in there with them?

A. No, sir.

Q. When the girls came out—will you describe what happened when the first girl came out?

A. I was standing in approximately the middle of these fifteen men in ranks at parade rest and I seen this first girl come out and walk over to a man in civilian clothes standing off to the left of me as I was facing and a C. I. D. standing to the rear of me, and she walked to this man and he directed her to pass down the line and point out any one she recognized. He also directed her to walk all of the way to the end of the line and on her way back to pick out whoever she identified.

Q. Which girl was that?

A. I don't remember which one came out first.

Q. What happened?

A. This girl turned around—I am rather confused on that—I can't tell about both of them; I would not want to state

it was the first girl. This girl turned around; I think it was the Dale girl; she walked over immediately to me and put her hand on my shoulder and said "This is the man". The C. I. D. directed her to walk down the line and make certain and she did and came back and said "I am certain".

29 Q. What about the other girl?

A. When the Cullom girl came out—

Q. Did you hear anything said between the two girls?

A. No, sir. She walked up to the C. I. D. man and he directed her the same as the Dale girl and she turned around and covered her face up and the C. I. D. asked if she had identified anybody and she said yes and he helped her over to where I was standing, and another C. I. D. man had not taken his hand from my shoulder and it was still on my shoulder and he asked me if I wanted to change my position in the line and I said "No".

Q. You mean this C. I. D. man was talking to you at the time this girl was walking from the Guard House to the line-up?

A. Yes, sir.

Q. How far was she away from you at the time, in feet?

A. At the most it would be ten feet, approximately.

Q. Did that happen with both girls or just with the one girl, regarding the talking to you?

A. Only the Cullom girl I believe he was talking—

Q. Now, do you know whether the girls, just prior to the line-up, were in the room concerning which you have just described the window?

A. I didn't know at the time but from the testimony at the trial I learned—

By Major CHAPMAN. Objected to.

By Mr. MATTHEWS. All right.

30 Q. Was there any conversation between you and the C. I. D. man regarding changing of position in the line-up?

A. The C. I. D. man asked me if I wanted to change my position in the line up after the first girl came out and went back in and at that time the other girl was on her way out. I told the C. I. D. man "There is no use in my trying to change my position in the line now because she would see me any way". She was within ten feet of me at that time.

Q. After the line-up were you called before Lieutenant Todd again?

leve at present the C. I. D. men were not there but they came in.

Q. What happened on that occasion?

A. The C. I. D. men asked me if I would make a statement that they had identified me. I said I would be willing to make a statement as to who or I was on the night in question and that was all. I had a reason to remember where I was on that evening. After quite some conversation he made out a statement for me to sign.

Q. Who made out the statement?

A. I believe the C. I. man did.

Q. What was said?

A. I read the statement over and it was merely my movements I believe on the 11th of July, 1944, and I signed it.

Q. The statement you signed was a statement as to where you had been, etc., and denying the crime; is that right?

A. That is true, Sir.

Q. Now, as to admitting the allegations, what did Lieutenant Todd say to you on that occasion, if anything; did he say anything about wanting to help you?

A. He told me to cooperate with the C. I. D. people and tell them everything I possibly could and that all of the facts of the case would be thoroughly and impartially investigated and if I cooperated with them they would cooperate with me.

Q. Did you have any controversy, or any harsh words, with Lieutenant Todd on that occasion?

A. I referred to the line-up as not being conducted fairly.

Q. Is that as strong as you put it?

A. I don't recollect now, Sir.

Q. Was anything said about both girls identifying you and not once was anything said about a quick trial or a lesser sentence?

A. No, sir, I don't believe there was.

Q. Up to that time was anything said concerning Article of War No. 24, concerning compulsory self incrimination?

A. No, sir, the C. I. D. man was the first man to warn me of my rights when I signed the statement.

Q. Subsequently there was an investigation under Article of War 70?

A. Yes, sir.

Q. Who conducted that investigation?

A. Lieutenant Todd

Q. He was a "thorough and impartial" investigator?

A. Yes, sir.

Q. Now, subsequently did you have any conversation with Lieutenant Todd with regard to a Mrs. Kerry?

A. Yes, sir.

32 Q. Will you state what you said to him and what he said to you?

A. They had been with the Manning Tree Constabulary; they had interviewed these prosecutors in the case.

Q. By that you mean the Daly girl and the Cullum girl?

A. Yes, sir, they went to see both of them but they didn't see both of them that day. They found the Dale girl that day. Lieutenant Todd took me over there. After we got outside in the Jeep he asked me if I was satisfied about talking to these girls. He was rather fair and so he said you have one other witness here a Mrs. Kerry, she lives in Brantham. He asked me if I wanted to see her. I didn't know exactly whether I did or not. I said I would let him know. He said "You said this Mrs. Kerry cannot identify you, she has never seen you; so if you go there and talk to this woman she will know what you look like so my advice to you would be to wait until it comes up, and if she can't identify you it will be a point for you.

Q. Subsequently, at the trial, was Mrs. Kerry mentioned?

A. Mrs. Kerry was mentioned repeatedly throughout the trial.

Q. As a matter of fact she accompanied the Cullum girl for some considerable time on the night of the alleged attack?

A. Yes, sir.

Q. Was Mrs. Kerry called on the trial?

A. No, sir, she was not.

Q. She was not a witness?

A. She was not a witness.

Q. Now, will you tell the Court what happened with regard to some statement or other of Mrs. Kerry's at the trial?

33 A. The trial Judge Advocate tried to enter a statement from Mrs. Kerry.

Q. That is Captain McNeill?

A. Yes, sir, Captain McNeill.

By Major CHAPMAN. I must object to this line of evidence because the record will speak for itself and I don't think we should go outside of the record and ask this witness to tell what happened two and a half years afterward.

By the COURT. The objection is sustained.

By Mr. Matthews. According to one of the decisions you have a right to go outside of the record in order to bring out the true facts. I would like to advise the Court that what I want to bring out goes to the merits of this whole controversy; if it is not included in the record and it should have been included in the record we contend the record is not complete.

By the Court. Have you any authorities on that. My understanding is that a record speaks for itself.

34 By Mr. Matthews. Dorsey vs. Gill, 148 Fed. 2, 857-867, is a case in point.

By the Court. Do you propose to contradict the record?

By Mr. Matthews. To that extent, yes, sir.

By Major Chapman. The Government's position is that this is a record of a trial before a duly constituted Court created by Federal Statute and there is a presumption of regularity which certainly cannot be rebutted by this witness. If there is anything wrong with this record it might only be attacked by possibly the reporter who took the record by showing his notes there were not correctly transcribed in here but certainly not at this stage of the proceedings can a witness be allowed to get up and testify to what took place on that trial and what was in the record or should be in the record. Certainly the record carries a presumption of regularity. It is a special type of court created by the Constitution which gives Congress the right

35 to make rules and regulations. They have formulated Articles of War which set up a certain type of court. Certainly this witness cannot impinge the regularity of this record. I certainly object to the testimony of this witness who attempts to attack this record.

By the Court. Do you take the position you cannot go beyond the record for any purpose?

By Major Chapman. It is difficult for me to say, your Honor, because I don't know what Mr. Matthews is bringing out. I am bound by this record; the Court is bound by this record. This point I would like very much to bring out. The Court is well aware of the fact that when the losing party prepares his case on appeal it is examined. The Appellate Court, in this instance is a Board of Review. They accept the record as containing all of the evidence pertaining to that appeal and under the army procedure we have a system of authentication which is very similar to the civil practice. If there is any objection to the record in civil cases you offer your objections. In this case the record

contains, at the close of the testimony, and after the sentence has been pronounced an Authentication which reads as follows: "Authentication" and it is signed by Captain Harley J. McNeal, Trial Judge Advocate, and by the
36 President of the Court, Colonel Donald P. Groul, and it is indicated that the Defense Counsel examined the record and authentication and it was initialed by Defendant's Counsel which corresponds to our civil practice.

By the Court. That was done here?

By Major Chapman. Yes, your Honor, we have the original record.

If your Honor cares for this now I will offer the certified copy of the authentication of the record now. I intend to offer it as part of the Government's case.

(The record is handed to the Court and his attention called to page 160.)

By the Court. Mr. Matthews, do you think you should make an effort to examine on the particular part of the record that is incomplete?

By Mr. Matthews. I will do that, I will attempt to comply with your request.

We contend a statement was offered in the course of the trial by the prosecution, by a Mrs. Kerry wherein Mrs. Curry said "If I was in Court I would not identify him as the man who walked along the road with Mary Cullen. Thereupon an objection was made, and the statement, after it had been read, was finally stricken from the record, and we contend that that was suppressing testimony which in effect did not get into the record and which was
37 highly prejudicial to the conceded facts up to this point, that Mrs. Kerry never saw the man sufficiently on the night she walked with Mary Cullum to be certain. I don't know where the Court Reporter is. While Counsel argues that in civil cases you stipulate the record, here was a case, in so far as we know, where the lawyer was a layman. We never consented to that record; we never had a chance to argue on appeal. This was assigned Counsel and I don't know if he even was a lawyer.

By Major Chapman. The lawyer was Smith's own choice. If we opened the record to any such attack as this we might as well burn the record or throw it away. I am most certainly objecting.

By the Court. We will sustain the objection and note an exception for the Petitioner.

By Mr. Matthews.

Q. When you were held for trial was a lawyer assigned to you?

A. By the Courts Martial.

Q. Had he authority to?

A. Yes, sir.

Q. Who was that lawyer?

A. Captain William Kapelman.

Q. And did he try the case?

A. Yes, sir.

Q. Did he ask all of the questions?

38 A. Yes, sir.

Q. Now, was there another Counsel in that case?

A. There were two other Counsel.

Q. Who were they?

A. Lieutenant William J. Crollard, Jr. and Lt. Lieberman, appointed by the Court.

Q. Now, in regard to Lieutenant Lieberman, did you request him to be Counsel in that case?

A. No, sir, I did not.

Q. Will your state the facts and circumstances with him being present?

A. The night before the trial I was taken from Headquarters to consult with my Counsel and at that time he introduced a second lieutenant to me and he told me that man had been assigned to Headquarters and he was sent down to observe the case. Lieutenant Lieberman told me he had been an attorney for a number of years but was not very familiar with Military Law and was trying to find his way around.

Q. Did he take any part in the trial?

A. No part whatsoever that I had any knowledge of.

Q. Did he ask any questions?

A. None whatsoever.

Q. What about Lieutenant Crollard?

A. Lieutenant Crollard kept the notes of the trial.

Q. How did he get into it?

A. I didn't know if Lieutenant Crollard—because he was an officer from our station, and he had been Trial Judge Advocate on the Staff for a considerable

39 length of time and had a very good record.

Q. Was he a lawyer?

A. He didn't state; I don't believe he was.

Q. Counsel Lieberman is not mentioned in the record; you say he was there?

By Major CHAPMAN. Is that a statement or a question? May I direct your attention to the record on page three wherein it is shown that he was not appointed by the Court; he was requested by the accused at the time of the trial.

By Mr. MATTHEWS.

Q. Then, as I understand, Captain William Kapelman and First Lieutenant William M. Crollard were appointed by the Court?

A. Yes, sir.

Q. And Lieberman was there at your request?

A. No, sir, he was not there at my request. I might have requested him but I was requested by Captain Kapelman to let him hear the case.

Q. Do you know wheher Lieutenant Crollard was a lawyer?

A. I don't know, sir; I believe he was.

By Mr. MATTHEWS. I want to say. The facts in this case show that there was an attempted rape and there was a raping. As I see the procedure they started out by saying it happened at the same time and the same place and therefore it follows that it was the same man. The evidence was taken from both cases. This Mrs. Kerry—a statement was offered in evidence and was read and that statement was highly prejudicial in that she said "If I were in Court I would identify him". When the statement was completely deleted from the record—it was not only ruled out but it was completely deleted from the record. What I want to show at this phase of the case is what happened at that time. I take the position that it should have been in the record, and, further, that the accumulation of these errors resulted in the failure of due process of law.

By Mr. MAGUIRE. Your contention is that the evidence you are attempting to introduce now was improperly stricken from the record.

By Mr. MATTHEWS. Yes, sir, and was highly prejudicial. The Military Court had it before them; the Reviewing authority did not have it before them.

By Mr. MAGUIRE. The Military Court had it before it, and before it considered the evidence in the case it was stricken from the record, and that you contend was improper and highly prejudicial?

By Mr. MATTHEWS. That is correct.

By Mr. MAGUIRE. How did it hurt your client?

By Mr. MATTHEWS. The Court heard it and it was
41 there. It is the same as when you mention insurance in the trial of a civil case. It is my contention, under our theory, that I have a right to point out the jurisdictional errors. I have the right to point out the accumulation of miscellaneous errors; I have a right to point out that this verdict was against the weight of the evidence and the conclusion of law was erroneous and all of these matters are reviewable on Habeas Corpus. I have a right to go beyond the record to see what happened; if I can show substantial error and what it was, that this man did not obtain due process of law. If the Court had before it evidence which does not appear in the record and which is as prejudicial as we contend it to be, it is something the Court can determine whether it is one error or adds up to a total of errors.

(RECESS.)

By Mr. MATTHEWS.

Q. Did something happen in the course of this trial in connection with a radio log?

A. Yes, sir.

Q. Do you know whether there was anyone in the Court Room with a radio log.

A. Yes, sir.

Q. Do you know whether or not he had the time when the radio went off of the air?

A. He had the time of the relay of the broadcast.

Q. He had that time, the time that station went off of the air?

A. Yes, sir.

Q. Can you tell us what happened in regard to that witness; as to whether he was sworn or whether that evidence was presented.

42 By Major CHAPMAN. Objected to on the ground that the record speaks for itself.

By the COURT. Objection is sustained, exception noted.

By Mr. MATTHEWS.

Q. Did you ever make a previous application for a Writ of Habeas Corpus?

A. No, sir.

Q. Did you commit the offense you are accused of?

A. No, sir.

By Major CHAPMAN. Objected to as being irrelevant, incompetent and immaterial.

By the COURT. Objection is sustained.

By Mr. MATTHEWS. I would like to offer in evidence the scar on the Defendant's hand and have the Court examine it, for the purpose of physically showing that the scar resulted from a cut. My reason for making this offer is that at no point in the record did the girl who testified that she bit this man state anywhere whether or not this cut was deep; whether it punctured or wounded, or whether any blood was drawn, or with what severity this bite took place; and I would like to offer that scar in evidence and have the Court examine it for the purpose of ascertaining the dimensions, the size. There is no description of this cut in the record made by medical evidence whatsoever. The only description of this cut is one by Constable Felton; further it is a very important factor because it appears from the evidence that Constable Felton first saw this scar at an examination which took place about 7:30 in the evening of the day testified to by the witness, and that the complaining witness made a statement, which appears in one of the exhibits, wherein she said "I bit his right hand" whereas as a matter of fact the scar is on the left hand. With that declaration I would like to offer the scar in evidence and call it to the Court's attention.

By Major CHAPMAN. I would certainly object to the admission of any such testimony. Such an offer does not attack the jurisdiction of the Court and at this time it is too remote; and, further, it is an attempt to assert that the Trial Court gave full credence and weight to the evidence concerning the cut, but there is no evidence that the Court paid any attention to it in its deliberations. It very definitely goes to the weight and sufficiency of the evidence over which this Court has no jurisdiction on a hearing on a Writ of Habeas Corpus.

By Mr. MATTHEWS. The Reviewing Authority clearly states that Constable Felton identified this man by the marks of the bite. The evidence shows that this girl said she scratched the Defendant and that she bit his right hand, and that was the real means, according to Constable Felton's testimony of singling this Defendant out from all of the men. Further the Reviewing Authority specifically sets forth that cut as one of the major reasons for sustaining this conviction; that was one of the major points in sustaining this conviction, as stated by the Board of Review. It sets it forth in some detail.

By Major CHAPMAN. Your Honor has a copy of the report of the Board of Review; it is rather lengthy and it

discusses all the evidence and the reasons for the Board's opinion. If it is going to save time I have no objection to your Honor looking at the man's hand at this time.

By the Court. I don't see that it has any relevancy, but I have no objection to looking at the wound.

By Mr. Matthews. I argued to your Honor the accumulation of errors; this is just another factor that goes into the situation, that as a result of the accumulation of errors this man was denied due process of law in this trial and not having due process of law he, therefor, is unjustly convicted and the Court loses jurisdiction. If the girl said she bit the right hand and the scar appears on the left hand and the Constable stated it was the results of this bite that enabled him to identify him it appears to me that would be a very important point.

By the Court. I will have to sustain the objection and note an exception for the Defendant.

By Mr. Matthews. I would like to supplement my brief to this extent: that the Government, in their Answer, deny that Lieutenant Todd was one of the original investigators of this offense. By that I make a distinction between Article 70 where you have a fair, thorough and impartial investigation. On the bottom of page 2 it is stated "Respondent denies the allegation and alleges that Lieutenant Todd did not conduct the preliminary investigation, etc." I would like to call the attention of the Court to the statement on page 101 of the record wherein Wilfred John Felter testified as follows:

"Q. When you first question the accused what circumstances led you to question Private Smith? A. We had a number of men we interviewed in Lieutenant Todd's office and Smith was one of them." The purpose of that, if the Court please, goes to the point that a thorough, impartial investigator should not be in the case and under the statute the person subsequently appointed to make a thorough impartial investigation pursuant to the 70th Article of War.

By Major Chapman.

Q. You told us that the first time you were questioned by Lieutenant, now Captain, Todd it was with respect to your theft of some funds; is that right?

A. Yes, sir; that was three months previous; approximately three or four months before that.

Q. And the second time you were questioned by Lieutenant Todd with respect to this particular offense you

told us you were questioned for some two hours in the presence of British Constables and others; is that correct?

A. Two British Constables, my Commanding Officer and Lieutenant Todd.

Q. And at that time I think you stated you thought they were still discussing the missing money?

A. During the majority of that investigation I believed that.

Q. Didn't you then say, on direct examination, that the reason you didn't want the Constable to see your hand was because you thought it didn't have anything to do with this missing money.

A. I don't recall.

Q. What was the reason?

A. I didn't think being a part of the United States Army, that any British Civilian had any right to maul me over.

Q. During this two hour investigation did you, during all that time, believe they were questioning you with respect to the missing money, the same matter that Capain Todd had questioned you about two or three months previously?

A. It became very questionable in my mind what it was about.

Q. What did they ask you?

A. They asked me where I had been on a certain night.

Q. What night?

A. July 11th I believe.

Q. Did you think where you were on the night of July 11th had any bearing on the money missing four months prior to that time?

A. It was a possibility it could have had.

Q. Did they question you with respect to any alleged attack on some girls?

47 A. It was not mentioned until nearly the end of this investigation.

Q. At the end you did know you were being questioned on an alleged attack on a couple of girls on the night of July 11th?

A. Just before I left this room Lieutenant Todd told me "I might as well tell you what this is about. A couple of girls were molested and Constable Felton seems to think you were responsible for it," and he asked me if I would consent to appear in a line-up.

Q. Did you so consent?

A. Yes, I did.

Q. When do you fix the time of the line-up with respect to the time you were first questioned in Lieutenant Todd's office by the British Constable in the presence of Lieutenant Todd and your Commanding Officer?

A. I know definitely what time the line-up was. It was either 7:00 or 7:30, between there.

Q. On what date?

A. I believe it was on the 18th.

Q. That is the date you were questioned in Lieutenant Todd's office by the British Constable?

A. Yes; it was the same day; I would not want to be definite about the date.

Q. You told Lieutenant Todd about it the same day?

A. It was the same day but I am not testifying to the date.

Q. It was the same day?

A. Yes, sir.

Q. Later on in the day?

48 A. Yes, sir.

Q. With respect to this Mrs. Kerry, did you at any time request your attorneys to subpoena her for the trial?

A. Yes, sir, I did.

Q. Whom did you ask?

A. Captain Lieberman; I asked him in the Court Room.

Q. You didn't ask him prior to the trial, did you?

A. I can't answer that question without an explanation.

Q. Did you at any time request the Judge Advocate, or his Assistant to subpoena Mrs. Kerry?

A. Not in open Court I don't believe it was asked.

Q. Did you make any request to the President of the Court or any member of the Court, for the presence of Mrs. Kerry at the trial?

A. Only my defense counsel.

Q. How do you mean that?

A. I asked my defense counsel for her presence as a defense witness during the course of the trial.

Q. Did you request the Court itself to have Mrs. Kerry produced as a witness?

A. No, sir.

Q. Did you ask the Judge Advocate, or his Assistant, at that time, to produce Mrs. Kerry?

A. No, sir; I didn't realize I had that privilege.

By Mr. Matthews.

Q. The Major, for the Government, just asked you whether or not you were questioned for two hours and as to whether or not during that period of time you thought

they were talking about an episode that happened several months previously when the money was missing?

A. Yes, sir.

Q. Will you tell the Court what you were interrogated about for the hour or two hours: state the general line of the questions.

A. I was asked what time I left the Station, where I went, if I was in any Pubs or Saloons, as they call them and how much beer I had drunk and what different times I was in these particular places and what time I had started back to the Station, and what time I reached the Station, and whom I came back with, if anybody, and what I did after I arrived on the Station.

Q. During all that phase of the conversation nothing was mentioned about girls?

A. There was no reference to girls until near the end of that investigation or interrogation.

Q. Did you say you thought it was a part of the original proceeding that had gone on before?

A. Yes, sir; I thought they were trying to check on these Pubs and check on what money I had spent.

Q. That is why you answered my question the way you did?

A. Yes, sir.

Q. In regard to the line-up, what did Lieutenant Todd say to you concerning your standing in a line-up?

A. He asked me if I would consent to stand in a line-up and I said I didn't see any reason for consenting to stand in a line-up as I had committed no offence and he said I would either go out there or "I could confine you in the Guard House and have them look at you without anybody else being present."

Q. In regard to Felton grabbing your hand; was there some commotion and confusion at that time in regard to that operation?

A. When he reached across me and grabbed my hand I resented it and I let him know I resented it; he was trying to get my hand away from me.

By Mr. MATTHEWS. If the Court please, I again request all of the proceedings in this case, the full and impartial investigation, the record of the trial, the Reviewing Authorities and the Review of the Judge Advocate General, and the Opinion of the Board of Review if these are admitted in evidence for the purpose of the Court's examination, we rest.

By Major CHAPMAN. At this time, if I have not done so, I will offer the duly authenticated copies of the record of the trial before the General Court Martial, the various Reviews, etc., including the report of the pre-trial investigation pursuant to Article 70 and any like papers or photostatic copies of any papers.

51 CAPTAIN ALAN B. TODD, called and sworn on the part of the Government, on direct and cross-examination testified as follows:

By Major CHAPMAN.

Q. You are an Officer in the United States Army?

A. I am.

Q. Were you such in July, 1944?

A. Yes, sir, I was.

Q. What was your duty Station?

A. A. F. Station No. 357, near Ipswich, England.

Q. Are you the Lieutenant Todd mentioned in this proceeding?

A. I am.

Q. Under what circumstances did you first have any occasion to interrogate Private Smith?

A. I was on duty as Provost Marshal of the Field and the first I knew about any such happening was one day about the 16th or 17th of July, two British Constables came to my office and said that there were two British girls that had been molested; that they had a description of the man and an investigation had been started by the C. I. D., and they were on the Station to see if they could aid in the investigation in any way. They gave me a description of the man as given to them by the girls.

Q. Did you think you recognized someone of that description as being stationed at your Base?

A. Not immediately, no.

Q. By what process did you arrive at the interrogation of Private Smith?

A. I told the British Constables they would have to have more than they had given me. They gave me the

52 nickname of a soldier they knew was in that vicinity. They went over the list until finally they got the man they referred to. They then inquired of this man of all of the men of our Base that he had seen in that vicinity. He referred to several people and he referred to one as a "fellow by the name of Smith." We went through our rosters again and found a Private Smith, and having had a prior investigation in which we had had Private Smith

on question, we called him in again, as it seemed to us he fit the description as they stated it.

Q. Did you ask for Smith's presence at the Provost Marshal's office on some occasion when the British Constables were present?

A. That is the occasion, the 16th or 17th, the first we knew that anything of this type had happened. We interviewed several men, of whom Smith was one, at the request of the British Constabulary.

Q. Who did most of the interrogating?

A. The British Police did some; I did some.

Q. Subsequent to that interrogation was there an arrangement made for a so-called "line-up" of a number of soldiers to see whether or not the Prosecutrixes could identify any of the men in the line-up as having been guilty of the alleged offense?

A. Yes, several days subsequent; because in the meantime I had been appointed Investigating Officer.

Q. The line-up was conducted by you in your official capacity as the Investigating Officer, pursuant to Articles of War No. 70?

A. That is correct.

Q. At any time was there a line-up at a time when you were not the Investigating Officer?

A. No, sir.

Q. Now, under Articles of War No. 70, did you have a line-up conducted?

A. I did.

Q. Will you describe, briefly, the procedure that occurred at that time?

A. We got fourteen men from my own Company, dressed all alike in their uniforms. We had Smith dressed in the same type of uniform. We had men of all sizes and shapes and heights and of all descriptions. We lined them up in front of the Guard House. Prior to calling Smith out I took his Commanding Officer into his cell and asked Smith if he had any objection to any type of line-up and he said he had not. I nodded to Captain MacGregor who knew what his answer was. We took Captain MacGregor along to protect his rights. Besides the Captain MacGregor we had as witnesses to the line-up, the Chaplain of the Field, the Executive Officer of the Field, and several others standing around. Prior to getting Smith we had the girls brought into a separate room of the Guard House. They had at no time seen Smith prior to the line-up.

Q. Did that room overlook the line-up?

A. Yes, sir, it did; but there were opaque panes in the window that you could not see through. I could not see out of the windows to the ground level.

Q. How tall are you?

A. Five feet seven inches.

Q. Were either of those girls taller than you?

A. They were both smaller.

54 Q. Go ahead.

A. When he said he had no objection to the line-up he was taken outside and told to take his place. One girl was brought out first by herself and there was a C. I. D. at the head of the line-up and he explained to the girl that she must walk down the line looking at all of the men and on the way back if she saw the man who was her attacker she should touch him. She did and picked out Smith. She was taken into the Guard House but did not confer with the second girl. The second girl was then taken out and she picked him out in the same manner. There was quite an emotional depression on the part of one of the girls because, as she said, she was afraid of the man. After that was over the girls were taken in hand by the British Police and taken home. There seemed to be no hesitation in their identification.

Q. Subsequently, was Smith brought into the Provost Marshal's office?

A. Smith was taken to his cell and his Captain went along with me and I asked Smith if he thought the line-up was conducted in a fair manner and he said it was, but he still protested his innocence. At no time did I threaten Smith and tell him that he had to answer questions or his right to get into the line-up or I would bring the girls into the cell. I was acting under the 24th Article of War.

Q. As a matter of fact, Captain, the accused never confessed to the commission of this offense?

A. No, sir.

Q. Prior to the time of your having been appointed Investigating Officer under Article of War No. 70, had

55 you formed any opinion in your mind as to the guilt or innocence of the accused?

A. I had not. I was perfectly of a fair mind. When I was appointed Investigating Officer I wanted to get at the truth of the matter.

Q. With respect to your investigation conducted pursuant to Article of War No. 70, what steps did you take to comply with Article No. 70?

By Mr. Matthews. Objected to, if the Court please.

By Major CHAPMAN.

Q. Just tell us what steps you took; what you did, when carrying out your duties as Investigating Officer.

A. I first of all informed Smith I was investigating the case in which he was accused and that he had the right to either make a statement or not to make a statement, and it could not be used against him. I told him there were certain witnesses I wanted to question and he had the privilege to come with me and examine them in my presence. That I would swear all those to be questioned under me.

Q. Did you in fact do that?

A. I did.

Q. Did you take the accused, Smith, with you when you went to interrogate witnesses to determine the advisability of recommending trial?

A. Every time.

Q. Did you afford him an opportunity to cross-examine those witnesses?

56 A. He had a full opportunity.

Q. Did you reduce the testimony of those witnesses to writing?

A. I did.

Q. Was the accused given an opportunity to read this testimony?

A. Yes, sir.

Q. Did he cross-examine those witnesses?

A. He did.

Q. Did he request certain witnesses called on his behalf to be interrogated by you?

A. Yes, sir.

Q. That was on the theory of an alibi?

A. Yes, sir.

Q. Did you comply with his request and call the witnesses he requested you to call?

A. I called every one of them.

Q. Did you examine them?

A. Yes, sir.

Q. Did he examine them?

A. Yes, sir.

Q. Were their statements reduced to writing?

A. They were.

Q. And as a result of the interrogation of the witnesses did you arrive at a conclusion which you furnished your Commanding Officer, the Appointing Authority, your conclusion as to whether or not he should be subjected to a General Courts-Martial?

A. I arrived at that conclusion and so recommend-
57 ed to my Commanding Officer.

Q. At the time you were interrogating various witnesses with respect to the matter did the name of a Mrs. Kerry come up?

A. Yes, the name of Mrs. Kerry did come up.

Q. Do you know what attempt, if any, was made to interrogate her, and any reason why she was not?

A. So far as from a prosecution standpoint it was not necessary. As far as from the Defense standpoint, I asked Smith if he wanted her and he said "No."

Q. You heard Smith testify as to the alleged conversation between him and you?

A. No such conversation took place.

Q. What conversation took place in regard to calling Mrs. Kerry in regard to Smith?

A. I told him she was one of the people whose name had appeared in the case.

Q. Do you know the regularly appointed Counsel by the Court?

A. Yes, sir.

Q. Do you know anything about the qualifications of the assistant, the regularly appointed assistant defense Counsel, Lieutenant Crollard?

A. Yes, sir, he is a graduate of Notre Dame Law School and admitted to practice in Washington.

Q. Do you know anything about the qualifications of Lieutenant Lieberman?

A. No, sir.

By Major CHAPMAN. At this time I offer in evi-
58 dence a duly authenticated copy of the record of Harry Lieberman on file in the office of the Adjutant General, for the purpose of disclosing his educational and professional background.

Q. With respect to yourself, will you tell me what qualifications, what special qualifications, you may have which would assist you in being an investigating officer pursuant to A. W. 70?

A. I have a B. S. Degree and an L.L.B. Degree from a Law School and admitted to practice law in New York.

Cross Examination by Mr. MATTHEWS.

Q. Now, you say this line-up took place some time after you interrogated Smith on the first day?

A. That is true; yes.

Q. This crime is alleged to have taken place on the 11th of July, 1944; is that correct?

A. Yes, sir.

Q. What was the first time you had confronted Bernard in this matter?

A. As I stated before, either the 16th or 17th of July.

Q. How long after that was the line-up conducted?

A. Approximately a week.

Q. Is that your best judgment?

A. That is my best judgment.

Q. Are you reasonably sure of this, Captain, are you reasonably sure that you were appointed the Impartial Investigator under AW 70 prior to the line up?

A. Prior to the line up; yes.

Q. Are you certain of that fact?

59 A. Yes, I am.

Q. Now, as Investigating Officer you made certain reports?

A. I did.

A. Under AW 70?

A. Yes, sir.

Q. And you took certain statements?

A. I did.

Q. Did you take a statement from Sheila Dale?

A. I did.

Q. And at the end of that statement did you sign it?

A. I think I authenticated it, she signed it.

Q. I call your attention to Exhibit B page 4 of the pre-trial Investigating Officer's report that you made, and ask you whether the following statement is true. "This is the statement of Sheila Dale. At 7:15 P. M. on Tuesday, July 18th, 1944, I attended an identification, etc. etc. and picked out a man who was brought with fourteen other men as the man who had assaulted me on July 11th, 1944. I had not seen this man from the time he had assaulted me, etc."; I ask you if that is a correct statement?

A. I cannot tell; it is not my statement.

Q. You attested that it is a true copy, that on the 18th an identification party was held?

A. I attested this is a true copy of something the Dale girl said to the Constable.

Q. She stated that on the 18th of July the identification detail was held?

A. If she so stated it is in the statement.

Q. What date were you appointed the Impartial Investigator?

60 A. I don't recall the exact date. Major, do you have the date of the appointment?

By Major Cravens. No, I don't; I have the report.

By Mr. Matthews.

Q. What sort of document is prepared when you are appointed as an Investigating Officer under AW 70?

A. There is a regular form for it or it might be done by a letter also.

Q. When is the Impartial Investigator appointed with regard to the original report on the crime?

A. After charges have been brought.

Q. Before the charges are brought a report must be made by the arresting officer, whoever he may be; is that not so?

A. You can say that is so but it doesn't necessarily mean it is true; a man can be charged by any other person not a military person.

Q. I call your attention to this document and ask you if that is the report of the C. I. D. in this case?

A. It appears to be.

Q. What date was that made?

A. The 23rd of July, 1944.

Q. In the Army there is no question that if it is dated the 23rd it is made that day?

A. I don't know; the custom is to date a thing the day you do it.

Q. As a matter of fact that is stamped as received
61 July 28, 1944?

A. It is.

Q. You want to tell this Court you were appointed a thorough and impartial investigator before that report was made.

By Mr. Chapman. This report was not submitted as a basis for his appointment as an Investigating Officer; it is not necessary to have a report filed before an appointment is made.

By the Court. Is this not a matter of argument. It seems to me you are wasting an awful lot of time.

Hearing Ended.

62 Reporter's Certificate to foregoing transcript omitted in printing.

63 *Government's Exhibit No. 1.*

Not formally identified and marked by the Reporter at the time of trial but handed to the Court. Is now identified by the Official Reporter as Government's Exhibit No. 1, and filed with the Clerk of Court at Lewisburg, Pa.

Jno. M. Bain,
Official Court Reporter.

64 UNITED STATES (Emblem) OF AMERICA
WAR DEPARTMENT

WASHINGTON, January 17, 1947

I HEREBY CERTIFY that the attached is a photostatic copy of the record of trial of Bernard W. Smith, 32286877, by a general court-martial which convened at Headquarters VIII Fighter Command, AAF Station F-157, England, 25-26 August, 1944, together with accompanying papers; official copy of General Court-Martial Orders No: 75, Headquarters VIII Fighter Command, APO 637, 11 December 1944; holding of the Board of Review dated 9 December, 1944 and first endorsement of the Assistant Judge Advocate General, dated 9 December, 1944, on file in the office of The Judge Advocate General.

THOMAS H. GREEN,
Major General,
The Judge Advocate General.

I HEREBY CERTIFY that Major General Thomas H. Green, who signed the foregoing certificate, is the Judge Advocate General of the Army, and that to his certification as such full faith and credit are and ought to be given.

IN TESTIMONY WHEREOF I, ROBERT P. PATTERSON, Secretary of War, have hereunto caused the seal of the War Department to be affixed and my name to be subscribed by the Deputy Administrative Assistant of said Department, at the City of Washington, this seventeenth day of January, 1947.

(SEAL)

ROBERT P. PATTERSON,
Secretary of War.
By JAMES C. COOK,
Deputy Administrative Assistant.

65 WAR DEPARTMENT
THE ADJUTANT GENERAL'S OFFICE
Washington 25, D. C.

IN REPLY REFER TO:
AGKC-R 201 Smith, Bernard W.
(8 Mar 46)

26 March 1946

In the case of General Prisoner Bernard W. Smith, ASH 32,286,877, confined at the United States Penitentiary, Lewisburg, Pennsylvania, so much of the sentence to con-

finement published in General Court-Martial Orders, No. 75, Headquarters, VIII Fighter Command, dated 11 December 1944, as is in excess of sixteen years; is, by direction of the President, remitted.

BY ORDER OF THE SECRETARY OF WAR:
Adjutant General

Copy for:
The JAG
CM 3837
279112

66 RESTRICTED

GENERAL ORDERS NUMBER 88 HEADQUARTERS VIII FIGHTER COMMAND APO 637 AAF STATION F-341
17 October 1944

I.—ASSUMPTION OF COMMAND.—1. Under the provisions of AR 600-20, and par 1, SO 281, Hq Eighth AF, 15 Oct 44, the undersigned hereby assumes command of the VIII Fighter Command, effective this date.

BENJAMIN J. WEBSTER,
Colonel, Air Corps,
Commanding.

DISTRIBUTION: "C"

67 CONFIDENTIAL

HEADQUARTERS
VIII FIGHTER COMMAND
Office of the Commanding Officer
APO 637 AAF Station F-341

IX 1600
5 Jan 1945
BOTJAG-ETO
Hq:VIII FC REG No.: 50432

N-W-2
Received
6 Jan 1945 9:55 hrs.
Board of Review
BOTJAG-ETO
11 December 1944

GENERAL COURT-MARTIAL ORDER NUMBER.....75

Before a General Court-Martial which convened at AAF Station F-157 pursuant to paragraph 1, Special Orders No. 195, Hq., VIII Fighter Command, dated 9 August 1944, was arraigned and tried:

Private Bernard W. Smith, 32286877, Headquarters Detachment, 353rd Fighter Group.

CHARGE I: Violation of the 92nd Article of War.

Specification: In that Private Bernard W. Smith, Headquarters Detachment 353rd Fighter Group did at Ipswich-Manning Tree Road, Lawford, Essex, England, on or about 11 July 1944 forcibly and feloniously against her will, have carnal knowledge of Sheila Winifred Dale age 20, Victoria Cottages Station Road, Lawford, Essex.

CHARGE II: Violation of the 93rd Article of War.

Specification: In that Private Bernard W. Smith, Headquarters Detachment 353rd Fighter Group did, at Ipswich-Manning Tree Road, Lawford, Essex, England, on or about 11 July, 1944, with intent to commit a felony, viz, rape, commit an assault upon Miriam Florence Cullum, 57 Colchester, Road, Lawford, Essex, England, by willfully and feloniously dragging her from the highway into a field, hitting her with his fist on the head, taking hold of her throat with his hands and kicking her in the back with his foot.

6 Jan 1945

Record of trial examined by the Board of Review with the concurrence of the Assistant Judge Advocate General Branch Office of T AG with ETO and found legally sufficient to support the sentence.

B. FRANKLIN RITER
Chairman, Board of Review

PLEAS

To all Specifications and Charges: Not Guilty

FINDINGS

Of all Specifications and Charges: Guilty

SENTENCE

To be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. (One previous conviction considered).

The sentence was adjudged on 26 August 1944.

The sentence is approved, and, Article of War 50½ having been complied with, will be duly executed. The United States Penitentiary at Lewisburg, Pennsylvania, is designated as the place of confinement.
(CM ETO 3837).

By order of Colonel WEBSTER:

RICHARD X. ELLIS,
Lt. Colonel, Air Corps,
Chief of Staff.

OFFICIAL:
JOHN J. SAILORS,
Colonel, AGD,
Adjutant General.
DISTRIBUTION: (See reverse side)

68 DISTRIBUTION:
20 Cys—Judge Advocate, VIII Fighter Command.
2 Cys—Adjutant General, VIII Fighter Command.
69 1st Ind.

ECMcN:lbd

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations, 9 Dec 1944 To: Commanding General, VIII Fighter Command, APO 637, U. S. Army.

1. In the case of Private BERNARD W. SMITH (32286877), Headquarters Detachment, 353rd Fighter Group, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 3837. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 3837).

E. G. McNEIL.
Brigadier General, United States Army,
Assistant Judge Advocate General.

OUT 1600
9 Dec 1944

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 887

9 Dec 1944

BOARD OF REVIEW No. 1
CM ETO 3837

UNITED STATES
v.
Private BERNARD W. SMITH (32286877), Headquarters Detachment, 353rd Fighter Group

VIII Fighter Command. Trial by GCM, convened at Headquarters VIII Fighter Command, AAF Station F-157, England, 25-26 August, 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

HOLDING by BOARD OF REVIEW No. 1
Riter, Sargent and Sievens, Judge Advocates

1. The record of trial in the case of the soldier named above has been examined by the Board of Review.

2. Accused was tried upon the following charges and specifications:

CHARGE I: Violation of the 92nd Article of War.

Specification: In that Private Bernard W. Smith, Headquarters Detachment 353rd Fighter Group did at Ipswich Manning Tree Road, Lawford, Essex, England, on or about 11 July 1944 forcibly and feloniously, against her will, have carnal knowledge of Sheila Winifred Dale age 20, Victoria Cottages, Station Road, Lawford, Essex.

CHARGE II: Violation of the 93rd Article of War.

Specification: In that * * * did, at Ipswich-Manning Tree Road, Lawford, Essex, England, on or about 11 July, 1944, with intent to commit a felony, viz, rape, commit an assault upon Miriam Florence Cullum, 57 Colchester Road, Lawford, Essex, England, by willfully and feloniously dragging her from the highway into a field hitting her with his fist on the head, taking hold of her throat with his hands and kicking her in the back with his foot.

He pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, was

found guilty of both charges and their specifications. Evidence was introduced of one previous conviction by special court-martial for absence without leave for five days in violation of the 61st Article of War. All of the members of the court present at the time the vote was taken concurring he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. *Charge I and Specification:* Prosecution's evidence shows that on the night of 11 July 1944, Sheila Winifred Pale, 20 years of age, of Victoria Cottages, Manning Tree, Essex, England, rode her bicycle on a public highway between Brantham and Manning Tree (R8, 10). She was returning to her home. At a point on the road near Bucks Horns in Brantham she was accosted by a white American soldier who also rode a bicycle (R9-10). He cycled by her side and asked to escort her home. His advances were rejected by the girl. When the couple reached a pathway which is a "short cut" to Manning Tree, the soldier suggested they travel the same. The pathway follows a river bank and is "very lonely". Sheila refused the suggestion and continued her travel along and over the regular road. When about 100 yards beyond the entrance to the "short cut" the soldier grasped the handle bars of the young woman's bicycle and shook it. He said, "You have got to stop here whether you like it or not". Sheila fell from her bicycle (R11). The soldier dismounted from his bicycle, dropped it and then threw Sheila's bicycle onto a wide grassy path. The girl ran, but was overtaken by the soldier who grasped her from the rear and pinned her arms about her body. He dragged her back to the spot where the bicycles were on the ground, and picked up his own bicycle and threw it aside. In this operation Sheila again freed herself and ran away. Again the soldier captured her and dragged her onto a grassy patch. She "started making excuses"; that it would spoil her clothes; that her father would come any minute and that she had to arise early the next morning (R12-13). The soldier paid no heed and removed his coat. He then threw her to the ground. When

she screamed; the soldier put his hands to her throat and said,

"if I didn't stop screaming, he would murder me" (R14).

He then pulled up her skirt. She struggled kicked her legs and endeavored with her hands to push the man away. The soldier removed her knickers from her body and then extended himself on the ground at right angles to the girl with his chest on her right leg (R14-15). He pushed her legs apart, put a hand over her mouth and applied his mouth to her private parts. His tongue entered the lips of her genitals. During this process she endeavored to sit upright but was pushed to the ground upon each effort. After two or three minutes of this perverted practice he placed himself on the girl, inserted his penis in her vagina and engaged in sexual intercourse (R15), at the conclusion of which he arose, threw the knickers to the girl and said, "You had better put these on again". At her request he secured her bicycle for her (R16). He asked to see her again.

> "I was all for it because I wanted to get away. I thought if I said I would he would let me go. He said he wanted to meet me on Thursday night at 7 o'clock. First he said at the white bridge then he said: 'No, make it the other bridge, the one near the Bucks Horns.' I said: 'I will.' He said: 'I don't believe you will.' * * * I wanted to get away and get home. I was frightened that he would start everything all over again. * * * He wanted to kiss me good night and I think he did manage to. I let him. I saw he was getting mad again, so I let him do it to get away" (R17).

When Sheila arrived home in a hysterical, distraught condition (R39,54,58) she called her mother and informed her

> "I had been attacked by a sexual maniac and that if I didn't give in to him, he would kill me" (R18).

The skirt (Pros. Ex. 1) and knickers (Pros. Ex. 2) worn by Sheila during the occurrence of the events above described were identified by her and introduced in evidence. When she arrived at her home there was a wet stain on both articles of clothing (R19). Dr. James Davidson Hendon, founder and director of the Metropolitan Police Laboratory, made on 20 July 1944 a microscopic examination of the skirt and knickers and, as prosecution's witness, testified that by the discovery in the stains of spermatozoa he concluded the stains were male seminal fluid (R42-44, 45).

Due to the absence of tails on some of the spermatozoa there was a possibility that the fluid had been in the girl's vagina and then excreted therefrom (R46).

Dr. Frederick H. E. Beckett, of Manning Tree, Essex, England, examined Sheila about 1030 am on 12 July 1944. She had bruises on her right thigh, on her left arm [illegible] and left knee and a "graze" on her left knee. They were fresh bruises. An examination of the vagina showed she was not a virgin (47-48). On 2 August he tested her for pregnancy by applying to her the prostigmine test. The result of the test indicated the strong probability that she was pregnant (R49-50).

At the time Sheila went to Dr. Beckett on the morning of 12 July he informed the British civil police of her complaint and made his examination in the presence of Police Constable Wilfred John Felton of Mistley, Essex, who thereupon commenced an investigation of the case (R48, 93).

The foregoing evidence is proof beyond reasonable doubt that Sheila was assaulted on the night of 11 July by a white American soldier who secured sexual intercourse with her without her consent and in spite of her resistence by the exertion of force and violence upon her. All of the elements of the crime of rape were established (MCM, 1928, par. 148b, p. 165; CM ETO 3910, *Hartsell*, and authorities therein cited; CM ETO 3718, *Steele*; CM ETO 4017, *Pennyfeather*).

4. *Charge II and Specification:* Evidence for the prosecution established the following facts: Miriam Florence Cullum, 57 Colchester Road, Lawford, Essex, England, age 19 years, left Brantham on the night of 11 July 1944, accompanied by a friend, Mrs. Kerry (R60). They walked, although Miriam had her bicycle with her which she wheeled by her side. They passed a white American soldier on a bicycle (R61, 65) who soon thereafter turned, followed after them and accosted the women. He asked if he could see them home. Mrs. Kerry refused. The soldier walked with them, again asked to escort them home and again Mrs. Kerry refused. At this point she bid Miriam "good night". Miriam mounted her bicycle and rode in the direction of Manning Tree, but on the road between two bridges he overtook her (R61-62). He solicited her to escort her home but she refused and rode onward toward her home. The man accompanied her on his bicycle. When they reached the "white" bridge (being the bridge nearest Manning

Tree) he repeated his request and then suddenly turned his bicycle into Miriam's bicycle and knocked her to the ground. She struck her head against a telegraph pole and her bicycle fell onto the grass ledge. The soldier grabbed the girl by the hands and arms (R62, 71) and dragged her across the road to the righthand side thereof (R63, 72). In this movement Miriam struck her bicycle and bruised the inside of her left leg (R72). The young woman pulled the soldier's hair, scratched him and kicked him. She escaped his hold and reached a little bank on the edge of a "corn" field on the right side of the road. He followed her and as she screamed he grabbed her by the throat. Miriam tried to kick him but lost her balance and fell to the ground. The soldier kicked her on her left shoulder and dragged her into the field (R64). During this altercation the soldier repeated several times his intention to secure sexual intercourse with her (R64, 73). She succeeded in escaping from the cornfield onto the road pavement near the bicycles. He followed her, grabbed her throat and in the melee Miriam bit his hand (R64, 74-75). At that moment
74 Frank Albert Welham, "Bibury", Harwich Road, Lawford, and Corporal Cecil Carter, Bombardier (British), then stationed at Manning Tree, approached on bicycles (R66, 82-83, 85-86). The soldier, when he saw the two men, pushed Miriam and she fell over her bicycle. He mounted his bicycle and rode in the direction of Brantham — the opposite direction from Manning Tree (R66, 75).

Both Welham and Carter testified that when they met the girl she was sitting on the ground, was crying and was in a shaken, nervous condition. Her clothing was ruffled. She informed them that a "Yank hit me on the head several times" and "I have been attacked by a Yank". Carter escorted the young lady home (R83, 85, 86). Miriam's father (Herbert Arthur Cullum) testified that when she arrived home she was crying. The next day he saw bruises on her neck which remained several days. Subsequently Miriam showed him her bruised legs (R87-88). Police Constable Felton, on Monday 17 July, saw Miriam and observed that the right side of her neck was swollen (R95). The foregoing facts were established by substantial, competent evidence and constitute complete proof of the offense of assault with intent to commit rape. The soldier repeatedly announced his intention to secure sexual intercourse with the young woman. These oral expressions of his felonious intention coupled with the otherwise inexplainable assault and battery he committed on Miriam's

person) fully sustain the findings of the specific intent to commit rape (CM ETO 2807, *Dixon*, and authorities cited therein; CM ETO 4293, *Davis and Bolton*).

5. The theory of the defense was that of alibi and to sustain that plea it produced the following witnesses whose testimony is hereinafter summarized:

Accused elected to appear as a witness in his own behalf. He testified that at 7:00 p.m. on 11 July 1944 he was on duty at the mess hall of the 351st Fighter Group. At 7:30 pm he left the station via post number 2 for East Bergholt. He arrived at his destination "close to 8 o'clock". He rode about the town on his bicycle for about 45 minutes or an hour looking for heavy liquor. Then he went to Brantham —about 1½ miles distant. He went to the "Bucks Horns Inn" and arrived at 9:00 pm. He drank one glass of beer and then went to "The Ark" (R110). He consumed two glasses of beer at the latter public house and left at 9:20 or 9:30 pm. He then went to the "Club" where he consumed another glass of beer remained 15 or 20 minutes and returned to the "Ark" at 9:45 pm. He remained at the "Ark" until closing time and left at 10:40 pm. (It was stipulated that it was 5 miles from the locus of the Dale crime to Gate #2 of the AAF Station 157 (R111-112)). It was three-quarters of a mile from situs of the rape of Sheila Dale to the "Ark" and between 4½ and 5 miles from the "Ark" to Gate #2 of the station. Upon leaving the "Ark" he rode his bicycle toward East Bergholt. Midway between Brantham and East Bergholt—about one-half a mile from Brantham—he encountered an American military policeman named Partyka about 10:15 pm or 10:50 pm (R112). Partyka and accused walked to the top of the hill, stopped five minutes to smoke and then rode slowly to the station. They reached Gate #2 between 11:15 pm and 11:30 pm, and proceeded to the mess hall of the 351st Group, which they reached not later than 11:30 pm. Staff Sergeant LePage and another soldier were present (R113). In the back room there were Sergeants Pelletier, Callendar and Hayes. Accused spoke to all of them. He was in the mess hall until after 12:00 midnight (between 12:00 midnight and 12:30 am) when he went to his barracks (R114, 117).

He denied he had ever seen Miriam except at the identification parade on 18 July when he was in a line of 15 soldiers. When she was "brought out of the guardhouse", a Criminal Investigation Department operative was stand-

ing a "little off" to accused's left, talking with him. had his hand on accused's shoulder (R114). Likewise saw Sheila at the identification parade. He had also her in the "pubs" in East Bergholt, but he did not see on the night of 11 July 1944 (R116). At the parade neither Mirjam nor Sheila looked at his hands which were behind his back (R121).

With respect to the wound on his left hand he testified that on the Thursday (13 July) following the Tuesday (11 July) of the alleged crimes he opened cans of milk with a cleaver and in the operation he stuck his hand (R115) "took a good nick out of it". It bled badly and he asked Sergeant Pelletier for a "band aid" (R116).

The bicycle he rode on the night of 11 July was khaki colored with a new black fender. He has one tooth missing from the left front of his mouth and one in the left rear (Accused displayed his mouth to the court. "His teeth were somewhat widely spaced") (R116, 117). When he left the mess hall he went first to his barracks and then to the orderly room (R118).

Upon cross-examination accused admitted that he could have arrived at the orderly room "any time between 11 and 1" (R118) and that "after 12 o'clock I am not sure of the time" (R119).

"Q. Your judgment of time after 12 o'clock was as good as it was before 12 o'clock on this evening?

A. There was no reason to remember the time after 12 o'clock. I was outside, there was no clock or anything.

Q. Was there an occasion before 12 o'clock for you to remember the time?

A. Yes, sir.

Q. What was that occasion?

A. At that time the radio was on" (R119).

76 He admitted that when he "signed in" he did not state the time he in truth arrived at the orderly room. He guessed at the time and "put down 2400 or 2300, I don't remember which it was" (R120).

Private Andy Partaka, Detachment A, 1260th Military Police Company (Aviation), testified he was at the "Bull and Horn" public house in Manning Tree on the night of 11 July; that he remained until it closed at 10:00 pm; that he actually left the place a "little after" 10:00 pm; that he talked to a girl until about 10:25 pm and then rode his bicycle in the direction of camp (R124). He did not see

about "quarter to 11" on the night of 14 July as he cycled up the hill to East Bergholt. At East Bergholt they stopped for five minutes to smoke, and reached Gate #2 of the camp at 11:30 pm (R125). Upon cross-examination he admitted he was "feeling high" and that

"All the time I didn't know what time it was.

Q. You were just taking what you thought the time was? A. It may have been close to midnight when I came on the post.

A. Yes, so" (R127).

He also admitted that he did not know whether the "Bucks Horn" closed at 10:30 pm or 10:30 pm (R130-131).

Sergeant Joseph C. Pelletier, 352nd Fighter Squadron, declared he saw accused on 11 July between 11:00 pm and 12:00 midnight (R132) when accused came into witness' sleeping apartment (R134). It was about ten minutes after the conclusion of the news broadcast of American Forces Network at 11:00 pm when accused came in the first time (R132). He then went out and returned the second time at approximately 11:45 pm - about 15 minutes prior to the BBC 12 o'clock news broadcast (R135). Witness had no watch or clock and judged the time by the news broadcasts (R134-135). On Thursday (13 July) accused, with one of his hands cut, entered the room where the medical-aid kit was kept and witness was present. Blood was running from his hand and accused said he cut it opening cans (R133). However, Pelletier did not know which hand was cut nor whether it was the index finger or the thumb (R135-136). The cut was around the tack of the left thumb (R136).

First Sergeant Robert A. Hanes, 351st Fighter Squadron, saw accused approximately 11:30 pm or 11:45 pm on 11 July in the kitchen of the mess hall in the 351st Fighter area. He based this time computation upon the fact he left a public house in Dedham between 10:30 pm and 10:45 pm. It was a ride of 30 minutes from the public house to the camp. Witness was in the area 10 minutes and in the mess hall 10 minutes before he saw accused (R137-138). He was positive it was not later than 11:45 pm that he saw accused (R139).

Staff Sergeant Edward R. LaPage, 351st Fighter Squadron, had been in Colchester on 11 July. He left that town about 10:40 pm in a taxicab. It required 25 minutes to travel to camp. He arrived at camp about 11:05 pm or 11:10 pm and went to the mess hall where he

arrived about 11:15 pm. After about 30 minutes, accused entered the hall - about 11:45 pm (R139-140, 142). Witness admitted he had stated to the investigating officer that accused arrived from 30 minutes to an hour after witness reached the mess hall, but now claimed he was confused as to dates (R142). However, he further admitted that he recognized the time from the hour the taxi was ordered to pick him up in Colchester - 10:30 pm - and not from observation of any watch or clock (R143).

Technical Sergeant Stanley E. Phelps, 353rd Fighter Squadron, stated that on the night of 11 July he was at the "P. X." drinking beer until 10:15 pm when the Officer of the Day excluded him from the Exchange (R143). He went to his barracks and then to the mess hall with LaPage. At about 11:30 pm accused entered (R144). Witness admitted that he did not look at any watch during the evening and that he did not know the exact time he saw accused although he said it was 11:30 pm (R145).

Mrs. Grace Somerhill, 63 South Street, Manning Tree, testified that in the community of Manning Tree the reputation of Sheila Winifred Dale for chastity was bad (R146).

6. The court of its own motion called witnesses who testified as follows:

Private Andy Partyka, recalled, testified he was "feeling good" on the night of 11 July. He drank seven or eight pints of beer but could ride his bicycle (R147-148).

Corporal William E. Sterman, Headquarters Detachment, 353rd Fighter Group, was charge of quarters on the night of 11 July. He produced the "in and out" book of the Squadron for that date which showed accused "signed in" at 2300 hours (Court's Ex. 1) (R148-150).

Captain Ernest P. MacGregor, Headquarters 353rd Fighter Group, testified that a soldier coming in from leave should "check in" as of the time he reaches the orderly room (R150-151).

Sergeant Joseph C. Pelletier, recalled, testified that small milk cans were opened by use of a cleaver. A long slit is made in the top of a can (R151).

7. Upon rebuttal the prosecution presented the following witnesses:

Cyril Baker, owner of the "Bucks Horn" Inn in Brantham, testified that on the night of 11 July he closed at 10:30 pm and customers were out of the house by 10:40 pm (R152-153).

Rebecca Emily Roust was the licensee of "The Ark" in Brantham on 11 June 1944. On that date it closed at 10:30 pm and patrons were out of the place five minutes later (R154-156).

Lieutenant Bernard F. Kelly, Headquarters 203rd Figures Group, testified that at AAF Station 157 on 11 July 1944 the time limit on the passes was 0100 hours "but our practice has been to stay out until 2400". It is immaterial whether men sign in, as of the time they arrive at the field or the time they check in the orderly room if it is prior to 0100 hours. Men must be off the street between 0100 and 0600 hours (R155, 157).

8. The vital question in this case arises in connection with proof of identity of the white American soldier who attacked Miriam Florence Cullum with the avowed purpose of securing sexual relations with her, and who raped Sheila Winifred Dale on the night of 11 June 1944. The time element (except dates) with respect to the two crimes was purposely omitted from the foregoing discussion of the proof of elements of the offenses (pars. 3 and 4 *supra*) because the same is extremely relevant in consideration of the question of identity.

(a) *The evidence is substantial and convincing that the same white American soldier committed the two crimes:*

(1) The loci of the offenses were in the near proximity of each other. *Miriam* was attacked on the road from Brantham to Manning Tree opposite a house beyond the "white" bridge (the bridge nearest Manning Tree) (R62, 82-83, 85). The "short cut" road from Brantham to Manning Tree, described by *Sheila*, commences near the "white bridge" (the bridge nearest Manning Tree) on the main Brantham-Manning Tree road (R11). It was about 100 yards beyond this point in the direction of Manning Tree that *Sheila* was knocked from her bicycle by the white soldier (R11). Special Constable Felton discovered the area on the ground where "tall weeds had been broken down as if some person had been lying there" and this spot was on the left-hand side of the road approaching Manning Tree about 100 yards from "Marsh Cottage", the house by the "white bridge" (R89, 94). It was therefore established that the site of the two crimes were approximately *four* yards apart.

(2) The time elements of the two crimes complement each other and are in harmony.

Miriam left Brantham at 10:30 pm. She reached the "Royal Crown" public house at about 10:38 pm, and it was

just prior to that time she first met the soldier (R69). It was 10:40 pm when *Miriam* left Mrs. Kerry and approached the first bridge (R69-70). The soldier "caught up" with her between the first and the second bridge, and "just beyond" the second bridge ("white bridge") he knocked her from her bicycle. The assault was completed and the soldier departed about 10:54 pm (R74). Welham and Carter left Brantham on their bicycles at 10:50 pm. Welham estimated the time he reached *Miriam* as about 11:05 pm. He passed a lone American soldier headed towards Brantham between the two bridges about 200 yards from the girl—about a five-minute ride (R84). Carter saw *Miriam* about a minute after he passed the lone soldier. Two American soldiers on bicycles preceded the lone soldier by three or four minutes (R86). Carter arrived at *Miriam's* home at about 11:15 pm (R86). *Miriam's* father fixed the time of their arrival at 11:10 pm (R87). Betty Goodall, a 16-year-old girl who was a guest at Marsh Cottage—the cottage by the bridge—on 11 July at 10:30 pm went to bed and read. At about 11:00 pm (estimated) she heard screams which came from the road (R89-90).

Sheila left her home at 10:30 with her sister, Pamela, and two American soldiers, "Kentucky" and "California", to cycle to Bergholt (R20, 40). They reached a point designated as the "top of the hill" at about 10:50 pm and *Sheila* went with "Kentucky" about 50 yards beyond "California" and Pamela. They stopped for about 10 minutes and at 11:00 pm started back towards Pamela who had departed (R21-23). At about 11:05 pm *Sheila* mounted her bicycle and started for home in the direction of Manning Tree (R24). It was at 11:10 pm she first encountered the white soldier who eventually raped her (R10, 25). They passed two American soldiers on bicycles at 11:20 pm (R10, 27). She was finally knocked off her bicycle by the soldier at 11:25 pm (R12). The rape was complete by 11:45 pm (R16, 38). *Sheila* reached her home between 11:50 and 11:55 pm (R17, 38, 54).

(3) The description given by *Miriam* of her assailant closely corresponds with the description given by *Sheila* of the man who raped her.

Miriam asserts that her assailant had "fair" hair and several of his teeth were missing. He wore an American soldier's uniform with no stripes. The bicycle he rode she believed was khaki-colored (R65). "He just kept narrowing his eyes" (R65, 79). He had a "roundish" face (R79).

Sheila described her assailant as follows:

"He has a roundish face, fair hair; there is a tooth missing on the left side and I think his other teeth are widely spaced" (R17).

(b) *The identification of accused as the assailant of the two victims is satisfactory, positive and substantial.*

(1) *Miriam* identified accused at the identification parade on 18 July (R68, 77-78) and in the courtroom (R66).

(2) *Miriam* bit her assailant on one of his hands (R64, 74-75). Police Constable Felton on 18 July observed on the ball of accused's left thumb a scab wound (R95) which was not of the type made by the clean cut of a knife. The instrumentality which caused it had penetrated the flesh. It was a penetrating wound (R102) as opposed to a mere abrasion (R103).

(3) The description of their assailant given by both *Miriam* and *Sheila* (par. 8(a)(3) *supra*) corresponds generally with accused's appearance. His hair is "fair, inclined to be dark" (R98). He has one tooth missing from the left front of his mouth and his teeth are somewhat widely spaced (R116-117).

(4) *Miriam* believed the bicycle which the soldier had with him when she was assaulted was khaki-colored (R65). The bicycle which accused rode on the night of 11 July was khaki-colored (R116).

(5) *Sheila* identified accused as her assailant at the identification parade on 18 July (R97, 99) and in the courtroom (R17).

The evidence produced by the defense contains accused's specific denial that he saw or was with either Miriam or Sheila on the night of 11 July 1944. In short, he denies positively his commission of the crimes with which he is charged and asserts that he was at his station or at least returning to his station at the time the offenses were committed. Several of his fellow soldiers testified to facts which in some degree support accused's contention. There was therefore produced an issue of fact which it was the duty of the court to resolve and determine. It was its duty and function to analyze and evaluate both the inculpatory and exculpatory evidence, synchronize and reconcile factors of time and place, judge of the credibility of witnesses and reconcile differences and irregularities in their evidence. The evidence identifying accused as Miriam's and Sheila's assailant as set forth above is not only substantial but highly convincing. Appropriate is this comment:

"With this evidence before the court, it was its province and duty to evaluate it, judge of the credibility

of witnesses and reach a determination whether the accused was the man who committed the atrocious crime. The evidence identifying him as the culprit was substantial and its reliability and trustworthiness are unimpeached. Under such circumstances the finding of the court will be accepted as conclusive and final on appellate review." (CM ETO 3375, *Turpeau*).

81 To the same effect are CM ETO 3290, *Price* and authorities therein cited; CM ETO 3897, *Dixon*; CM ETO 3910, *Hartsell*; CM ETO 4292, *Hendricks*. Upon appellate review the Board of Review must accept as final and binding upon it the findings of the court that accused was Miriam's assailant and Shelia's rapist, and with that conclusion the Board of Review is well satisfied.

9. Only one question with respect to trial procedure and to admission of evidence requires attention. The defense vigorously objected to the admission in evidence of testimony of identification of accused by Miriam and Shelia at the identification parade on 18 July (R97, 99-100). Police Constable Felton testified after objection by defense that Sheila identified accused as her assailant at an identification parade held in camp on 18 July. Miriam was also permitted to testify over objection of defense that she identified accused at the same identification parade on 18 July (R68). The problem thus presented for consideration for the first time before the Board of Review (sitting in European Theater of Operations) deserves careful consideration.

The question as to the admissibility of extra-judicial identification of a defendant in a criminal case is the subject of an exhaustive annotation in 70 ALR 910. Reference is made to said annotation for the citation of authorities. The comment of the editor is informatory:

> "There is a wide split of authority on the question of the competency of evidence of extra-judicial identification in a trial where the identity of the accused as the person guilty of the crime is in dispute. Formerly the rule excluding such testimony was applied by far the greater number of courts. In recent years, however, the tendency has been towards the admission of such testimony, both as substantive and corroborative evidence; so that now there exists a fairly balanced weight of authority on the question, with a slight preponderance of jurisdictions favoring admission" (70 ALR 911).

In view of the annotation of authorities above cited it would be a supererogation on the part of the Board of Review to indulge in an extended discussion of the problem at this time. However, the following quotation is adopted as expressive of the opinion of the Board of Review:

"'The trustworthiness of the identification is of first importance. An identification of an accused, made publicly for the first time by a witness in court, when there presumably have been many opportunities for the witness to have seen the accused and to have heard him spoken of by a given name, may be open to question; but, if it be shown that the witness identified the accused previously and the first time after his arrest or incarceration and under circumstances which removed the suspicion of unfairness or unreliability, the prior identification, together with the circumstances surrounding its making, will be of utmost aid in determining the trustworthiness of the identification made in the court room. Mr. Wigmore puts the reasons for the admission of the prior identification with unanswerable force: "Ordinarily, when a witness is asked to identify the assailant, or thief, or other person who is the subject of his testimony, the witness's act of pointing out then and there the accused (or other person) is of little testimonial force. After all that has intervened, it would seldom happen that the witness would not have come to believe in the person's identity. The failure to recognize would tell for the accused; but the affirmative recognition might mean little against him. * * * To corroborate the witness, therefore, it is entirely proper * * * to prove that at a former time, when the suggestions of others could not have intervened to create a fancied recognition in the witness's mind, he recognized and declared the present accused to be the person." * * * We are not unmindful of the number and character of the courts of the states which take a contrary view, nor of the reasons they give for the exclusion of this evidence. Giving due heed to these, we can but think that their adherence to a technical rule deprived the courts of their jurisdictions of the benefit of a class of evidence which has strong testimonial value when weighed in the scales of the common sense of mankind.'" (State v. Frost, 105 Conn. 326; 135 Atl. 446, quoted in 70 ALR, pp. 911-912).

It appears to the Board of Review not only do reason and logic support the rule permitting the admission of such evidence, but also practical necessity dictates its use. This is particularly true under the circumstances so frequently revealed in records of trial coming before the Board of Review where the issue of the identification of accused is sharply contested. The evidence in support of identification of accused as the malefactor is in the majority of instances dependent upon the testimony of civilian wit-
83 nesses who are nationals of the country in which the Army of the United States is engaged. These witnesses in a great number of instances are unfamiliar with the English language and must give their testimony through interpreters. They also experience difficulty in distinguishing the physiognomy of the American soldier—both white and colored—after the lapse of time between the incident giving rise to the charge and the date of trial. Under these circumstances evidence of their identification of accused within a few hours or days after the incident is perhaps the most satisfactory evidence available. While the argument of necessity cannot be used to support the admissibility of evidence which by a fixed and undisputed rule of law is not admissible, it is a relevant and highly important factor when a forum upon appellate judicial review is required to elect between two conflicting rules of law, each of which is supported by respectable authority.

The Board of Review in electing to adopt the principle that evidence of subsequent identification is admissible has not overlooked the case of *Hopt v. People of Utah*, (110 U. S. 574, 28 L. Ed. 262) decided by the Supreme Court of the United States on writ of error from the Supreme Court of the Territory of Utah in the year 1884. This case is often cited as an authority in support of the doctrine that evidence of subsequent identification is not admissible. If such were the holding of said case the Board of Review would, of course, feel itself duty bound to follow the same. The citator fails to show that the particular point in the Hopt case now under consideration has received subsequently any specific consideration by a Federal court. In *Thompson v. United States*, (144 Fed. (First Cir.) 14, 20) the *Hopt* case was distinguished with the comment:

> "The fact that the person who passed the spurious note . . . was in court and identified by the witness clearly distinguishes the incident from that involved in Hopt v. Utah".

Hoyt was charged with the murder of a man named Turner. In the course of the examination of a doctor who performed an autopsy on a body received at a railroad station in Salt Lake City, the question arose as to whether the body the doctor examined was that of the deceased Turner. The doctor did not know deceased. It was on this point that the court ruled:

> "No proper foundation was laid for the question propounded to the surgeon as to who pointed out and identified to him the body he examined, as that of John E. Turner. He had previously stated that he did not personally know the deceased and did not recognize the body to be his; he did not know that it was the body
> 84 which the father of deceased desired him to examine; consequently, his answer could only place before the jury the statement of some one, not under oath, and who, being absent, could not be subjected to the ordeal of a cross-examination. * * * The specific fact to be established by proof of what some one else said to the surgeon as to the identity of the body submitted to his examination was, that it was the body of John E. Turner. What Fowler, who was not even shown to have been placed in charge of the body nor commissioned to deliver it to the surgeon nor to be acquainted with the deceased, said in the absence of the prisoner, as to the identity of the body, was, plainly, hearsay evidence within the rule recognized in all the adjudged cases. As such it should, upon the showing made, have been excluded" (110 U. S. 581-582; 28 L. Ed. 265-266).

It will be seen therefore that the point involved in the instant case was not in fact raised in the *Hopt* case. There can be no quarrel with the rule therein announced as applied to the facts before the court. The Board of Review therefore concludes that the *Hopt* case is not determinative on the question of admissibility of evidence of subsequent identification of an accused at a "police line-up" or at an identification parade and that it is free to adopt the rule which appears to it more nearly to meet the requirements of justice. In this connection it is interesting to note that in *United States v. Fox*, (97 Fed. (2nd) 913) the discussion of evidence of a "police line-up" identification proceeds on the hypothesis that such evidence was admissible without question (see p. 914).

In the opinion of the Board of Review no error was committed in the admission in evidence of Felton's testimony that Sheila identified accused as her assailant at the iden-

tification parade or of Miriam's statement while on the witness stand that she also identified accused as her assailant at the same identification parade.

10. The charge sheet shows that accused is 33 years four months of age. He enlisted at Syracuse, New York, 2 May 1942 to serve for the duration of the war plus six months. He had prior service in the United States Navy from 11 May 1928 to 11 May 1932. (Character of discharge; undesirable).

11. The court was legally constituted and had jurisdiction of the person and offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence.

85 12. The penalty for rape is death or life imprisonment (AW 92). Confinement in a penitentiary is authorized for rape by AW 42 and sections 278 and 330 Federal Criminal Code (18 USCA 457, 567), and for assault with intent to commit rape by AW 42 and section 276 Federal Criminal Code (18 USCA 455). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is proper (Cir. 229, WD, 8 Jun 1944, sec. II, pars. 1*b*(4) and 3*b*).

B. FRANKLIN RITER,
Judge Advocate.

ELWOOD W. SARGENT,
Judge Advocate.

EDWARD L. STEVENS, JR.,
Judge Advocate.

86 HEADQUARTERS NYV (G-18)
VIII Fighter Command
Office of the Staff Judge Advocate
APO 637 AAF Station F-341

19 September 1944

Review of the Staff Judge Advocate

UNITED STATES,

v.

PRIVATE BERNARD W. SMITH; 32286877, Headquarters Detachment, 353rd Fighter Group, AAF Station F-157.

Age: 33 years, 4 months.
Total Service: 2 years, 3 months (in the Navy for 4 years—character of discharge—undesirable).
Character of Prior Service: Fair.
Previous Convictions: One.
Restraint: Confined at Station Guardhouse AAF Station F-157 from 18 July 1944.
Date of Trial: 25-26 August 1944.
Place of Trial: AAF Station F-157.

Charges	*Specifications*	*Plea*	*Findings*
I. Violation of AW 92	Rape of 20 year old English girl.	Not Guilty.	Guilty.
II. Violation of AW 93.	Assault with intent to commit rape on 19 year old English girl.	Not Guilty.	Guilty.

Sentence: Dishonorably discharged, confinement at hard labor for life and total forfeitures.

Maximum Punishment: Death or confinement at hard labor for life (mandatory).

1. *Evidence: a. For the Prosecution:* At about 10:30 P. M., 11 July 1944, Miriam Florence Cullum, a 19 year old girl, weighing 118 pounds, left Brantham to go to her home in Lawford, Essex (R 60, 82). She was accompanied by a Mrs. Kerry (R 60). As they were walking along, Miriam wheeling her bicycle beside her, an American soldier passed by. The soldier turned around and came back and asked

whether he could see them home. Mrs. Kerry replied "No", but Miriam said nothing. Nevertheless, the American continued to walk along with them. He asked where they lived. Mrs. Kerry replied, "At Brantham". The soldier retorted that Mrs. Kerry might live in Brantham but that Miriam lived in Manning Tree (R 61, 70). Again he asked them whether he could see them home and was refused. Then Mrs. Kerry left Miriam, and Miriam rode away on her bicycle. Near a bridge on the road to Manning Tree, opposite a small cottage which is the only dwelling in the immediate vicinity, the same soldier caught up with Miriam (R 61, 82, 85). The time was about 10:40 P.M. He asked whether he could see her home several times, but she refused each time. Suddenly he turned the wheel of his bicycle into Miriam's and knocked her off. She struck her head on a telegraph pole (R 62). The soldier then grabbed hold of her arms and started to drag her into the adjoining field. Miriam "pulled his hair, scratched him and kicked him", but he did not let her go. She fell down, and he
87 kicked her in the shoulder (R 63). He dragged her across the road and about 10 or 12 feet into an adjacent cornfield (R 72, 73). She managed to get away and ran back almost to the roadway, screaming. He caught up with her, however, and grabbed her by the throat, which so terrified her that she lost her voice (R 63). All this time he was mumbling to himself, some of his mumblings being unintelligible to her, but she heard him say several times, "I am going to fuck you". She kept on struggling and bit his hand beneath the base of the thumb—in "the fat part of his hand on the inside" (R 61, 74, 81). When she did this, he hit her on the head with his fist and swore (R 64, 74). He was trying to drag her back into the field, when he saw two people approaching. He thereupon pushed her to the ground and rode off (R 74, 75). The two people were a Mr. Welham and a British soldier. At first they passed by the girl but then came back thinking something was wrong with her. They found her crying, lying half in the roadway and half in the grass. They picked her up from the ground. She was nervous and shaking and her clothing was ruffled. She told them that she had been attacked by a Yank. The soldier took her home, Welham going along part of the way. Miriam sobbed nearly all the way back (R 83, 86). She told her mother and father what had happened. The next morning she was stiff all over, had bruises on her left shoulder, bruises on her legs and her throat was swollen (R 67, 88).

Wellman and the British soldier testified that just a moment before they arrived on the scene they saw a white American soldier pass by on a bicycle (R 84, 86). They fixed the time that they arrived on the scene at about 11 P. M. (R 83, 86, 89). Miriam reached Mostaganem at 11:05 or 11:10 (R 86, 87). About 11 P. M., a 16 year old girl who was standing in the cottage (Marabout Stage) near where Miriam was assaulted, heard a woman scream twice, the screams coming from a distance in the direction of the front of the house. She called her mother, but the latter did not hear the screams and said that it was probably someone returning from a dance (R 89-91).

When the attack took place, it was dusk, light enough for Miriam to see. She described him as having a foppish face, fair hair and several teeth missing (R 79). He wore an American uniform without any stripes (R 65). Miriam testified, "I would never forget his face" (R 78). In open court she identified the accused as her assailant (R 66). She had previously identified him in an identity parade, in which about 15 other soldiers were lined up with the accused (R 79). When she walked up to the accused in the line-up, "he narrowed his eyes - the same as he did when he attacked" her (R 79). She had never seen the accused before the night of the attack (R 80).

On the same evening, Sheila Winifred Dale, a girl of 20, had a date with an American soldier called Kentucky, and her sister had a date with another American called California (R 8, 20). The four of them stayed at the Dale home in Manning Tree until about 10:30 P. M., talking and listening to the radio (R 20). The two soldiers asked the girls to ride back with them as far as Bergholt. They rode together until they reached a steep hill, where they dismounted and walked up the hill. Sheila's sister and her partner stopped, and Sheila and her companion walked ahead about 50 yards, stopping at the side of the road (R 21). They stood there talking about ten minutes when California rode by alone. Kentucky walked back a bit with Sheila, but her sister was not in sight. Sheila thought that her sister was riding slowly on ahead and that she could catch up. Kentucky wanted to accompany her, but she told him she could make it alone. Kentucky gave her a good night kiss, a "brotherly kiss", the bicycle being between them, and they parted about 11:05 P. M. (R 24). Sheila rode on about 100 to 150 yards, but saw that it was getting dark so she got off her bicycle and started to walk since she had no

bicycle lights (R 9, 25). Just then an American soldier approached and said, "Hello there" (R 9, 25). Sheila did not answer. She saw the soldier turn his bicycle toward her, so she got on her own and "rode fast", because she "didn't want anything to do with him" (R 10, 25). However, the soldier caught up and rode his bicycle in front of hers and put his hands on her handlebars, causing her to get off (R 10, 26). This was in Brantham, about one mile from Manning Tree. The time was between 11:05 and 11:20 P.M. (R 9, 10). Just then two soldiers came riding by, to whom the other soldier shouted something which Sheila did not understand. Sheila got back on her bicycle and continued to cycle along, the soldier cycling along beside her and talking to her. She did not answer except to tell him she did not want him to see her home (R 11). They reached a bridge near the beginning of a lonely short cut to Manning Tree. The soldier suggested they take the short cut, but Sheila said that she didn't live near there. She cycled about 100 yards further ahead when the soldier caught hold of the handlebars, shook the bicycle and said, "You have got to stop here whether you like it or not." Sheila fell off her bicycle (R 11, 28). The time was approximately 11:25 P.M. The soldier dropped his own bicycle, seized the girl's and threw it on the grass verge. Sheila ran away, the soldier pursuing. She did not run very far. She "was nervous and lost the strength of (her) legs". The soldier caught up, seized her from the back, pinning her arms to her sides, and dragged her into a patch of long grass about 100 yards from the bridge and about 50 to 75 yards away from the nearest house, a cottage. She struggled as he dragged her along and also made excuses—that he would spoil her clothes, that her father would be along any minute, that she had to get up early (R 13, 29). She pleaded with him to let her go, but the soldier took no notice of her talk (R 33). He took his coat off. He forced her to the ground. She screamed several times, but he put his hands on her throat and told her he would murder her if she did not stop. She was "so frightened of him", she didn't scream any more. He started pulling her clothes up. She struggled, kicking her legs and trying to push him off with her hands. He finally got her clothes up and started taking her knickers off. She was kicking and struggling all the time, but he was, nevertheless, able to pull the knickers off (R 14, 30). The knickers were not torn during the struggle but the seam in the fork was split (R 32). He laid on her

right leg with his chest and started pushing her legs apart with his hands. His head was in her lap and his feet stretched out at right angles from her body. She wanted to scream and thought that she did scream. She remembered that he put his hand over her mouth, and that she tried to push his hand away. He got her legs apart and started mouthing her genitals. She could feel his tongue. She could not say how long this lasted; as she testified, "it seemed ages to me but I should say about two or three minutes". All this time, she was trying to raise herself up to see if anybody was coming along the road, but he kept pushing her down (R 15). When he stopped mouthing her she was quite exhausted. She put her legs together, but as she testified, "he was so much stronger than me he mastered me every time." She didn't try kicking him in the groin because she "didn't dare", she "didn't have the right shoes on" and was afraid it might kill him (R 36). When he stopped sucking, he threw himself on top of her, pulled her clothes up farther and inserted his penis into her private parts (R 15). He had difficulty penetrating because she struggled all she could. He was hurting her so much she could not move her hips from under him (R 36, 37). She did not see his penis but it could not have been his finger from the way it hurt (R 37). He kept his penis in her body four or five minutes, all the time moving up and down, breathing very hard and using "terrible swear words to himself", saying "fucking" and "lovely cunt". Then he got off. She felt "wet" on her legs and genitals. He picked up her knickers, threw them at her, and said, "You had better put these on again". This was about 11:45 P. M. She put on her knickers and started "making excuses" because she wanted to get home. She was nervous and "didn't have actually any strength" in her body. She asked him to get her bicycle and he got it (R 15, 16). He asked to see her again two night later. The girl "was frightened that he would start everything all over again", so she said she would meet him again, thinking that he would let her go. He wanted to kiss her good night, and she let him because she saw that "he was getting mad again". Sheila got home about midnight (R 17, 54). She gave a hysterical cry as she entered and called out for her mother, complaining to her that she "had been attacked by a sexual maniac" and that if she "didn't give in to him, he would kill" her. Her sister and an American soldier who was summoned from a nearby house found her hysterical (R 18, 54). Her blouse was un

done, exposing her breast and the snaps of her skirt were undone (R 54, 59). Her hair was unkempt and she was white and shaking (R 59). Her skirt had a "wet mark" on the back, which proved to be a stain from seminal fluid; and the knickers she wore were also stained with seminal fluid in the fork (R 18, 19, 56, 44, 45, Pros. Ex. 1, 2). Sheila's weight is 112 pounds (R 8). During all the struggle her glasses did not come off. They fitted tightly at the nose (R 30, 35). A medical examination the next morning in the presence of the police showed fresh bruises on the right thigh, left arm and left knee and a graze on the left knee. There were no marks on the girl's neck. A vaginal examination showed the girl was not a virgin. Bruises inside the vagina were not indicated. A fairly reliable test for pregnancy administered three times beginning on 2 August indicated that the girl had become pregnant (R 47-52). The test cannot be made accurately during the first three weeks of pregnancy, nor does it indicate the stage of pregnancy (R 50).

89 In court, Sheila described her assailant as having a roundish face, fair hair, a tooth missing in the left side of his mouth and his other teeth widely spaced, and then pointed out the accused as the man (R 17). She had never seen the accused previous to the night in question (R 26). The morning after the attack, she described the soldier to the police as being 5 feet, 10 inches tall, fair-haired, round-faced, teeth widely spaced, with some missing at the top left (Def. Ex. A). On 18 July, at AAF Station F-157, Sheila picked the accused out of a line-up of 16 men as her attacker (R 97-98). On the same occasion, Miriam Cullum also picked the accused out of the line-up as her attacker, but both girls made the identification separately and independently (R 80, 98). When Miriam gave the police a description of the soldier who had attacked her on 16 July, she had not previously talked to Sheila (R 80, 100; Def. Ex. B.).

Sheila testified that she looked at the clock when she and her sister and their dates left the house, and it was 10:30 P. M. then. All other times she testified to were her best judgment (R 40).

On the afternoon of 12 July, a local constable inspected the scene of the alleged rape. At a spot about 100 yards away and on the opposite side of the road from Marsh Cottage, about 10 feet away from a telegraph pole and 6 feet in from the grass verge along the road, the constable found

the grass and weeds broken down. This is very open country with no other houses [sic] for three [sic] to [illegible] yards away (R 84). On 18 July at AAF Station F-156, the constable inspected the accused's hands and found a scab from an incised wound on the 1st joint of the left thumb, which accused stated resulted from a cut with a cleaver, while he was opening milk cans (R 95, 96, 104).

The guard on duty at one of the station gates from 8 to 12 P. M. of the night in question, whose duty it was to check the passes of men going in and out, testified that the accused, accompanied by a soldier named Partyka, came in between 11:30 and 11:45 P. M. (R. 107).

The accused's commanding officers testified that soldiers out on pass are supposed to sign in in the pass book in the Orderly Room of the squadron at the time they come into the Orderly Room (R 157). The 1st Sergeant of the accused's organization testified that the general procedure with reference to the signing in by men on pass was to give the nearest quarter hour in the roster (R 155). The purpose of the roster was to show the hour that men checked in for the night, but there was a looseness about requiring the exact hour to be given (R 156 158). On the night in question the accused signed in at 2300 hours (Court's Exhibit 1).

b. *For the Defense other than the accused:* On the night of 17 July, Pvt. Andy Partyka, Detachment "A", 1260th M. P. Co., AAF Station F-157, was in Manning Tree "floating around and drinking" at various pubs. He left the Bucks Horn Public House a little after closing time with a girl with whom he cycled to the first bridge on the way from Braintham to Manning Tree. He stayed there with her about 15 or 20 minutes and then went on his way (R 124). He met up with the accused at about 10:45 P. M. about ¾ of a mile from the first bridge. They rode into camp together, arriving at the gate about 11:30 P. M. (R. 125). He was not previously acquainted with the accused (R 126). On cross examination, Partyka testified that he was feeling high that night and that he was not sure of the time (R 126). In his own words: "all the time I didn't know what time it was" (R 127). He figured it was 10 P. M. when he left the Bucks Horn because the wongin there called "Time", but he was not sure whether the pub closed at 10 or 10:30 P. M. (R 130). The accused mentioned to Partyka on their way back to camp that he (the accused) "had been out" with a girl or that he "had a girl" that night, the witness' memory not

being clear on this point (R 131). On rebuttal, the Prosecution proved that the Bucks Horn Tavern closed at 10:30 P. M. (R 153).

A number of soldiers with whom the accused worked at the Mess Hall testified as to the hour when they saw him in the Mess Hall on the night of 11 July. Sgt. Joseph C. Pellatier testified that he saw the accused about 10 minutes after listening to the A. F. N. news bulletin, which comes on the radio between 11 and 11:15 P. M. (R 132, 133). On cross-examination, however, he admitted he had no watch or clock to go by (R 134). The accused came into Pellatier's room twice, and about 15 minutes after he left the second time Sgt. Pellatier heard the radio announce 12 P. M. (R 135). Two days later, in the morning, the accused came to Sgt. Pellatier with a bleeding cut on his hand. The accused stated he had cut his hand while opening cans (R 133). 1st Sgt. Robert N. Hayes testified that he saw the accused in the kitchen of the Mess Hall around 11:30 or 11:45 P. M. (R 138). Staff Sergeant Edward R. LaPage testified that he left Colchester about 10:40 P. M., arrived at the base around 11:05 P. M., went to his barracks, and then to the Mess Hall and was in the Mess Hall 5 or 10 minutes when the accused came in sometime between 11:45 and 11:50 P. M. (R 140). On cross-examination, however, LaPage testified that the accused came into the Mess Hall about 1 hour after LaPage got there (R 141, 142). LaPage had no watch, and his estimates as to the time were just his best judgment (R 143). T. Sgt. Stanley E. Pleban testified he saw the accused in the Mess Hall about 11:30 P. M., but he did not remember checking the time (R 144).

Mrs. Grace Somerhill, a resident of the community of Manning Tree for 20 years, testified that the reputation of Sheila Winifred Dale for chastity was bad (R 146).

c. Testimony of the accused. After having been advised of his rights, the accused elected to take the stand as a sworn witness. He testified as to his activities on the night of 11 July substantially as follows: I left the post about 7:30 P. M. and arrived in East Bergholt about 8 P. M. I did some pubbing for about an hour and then went to the Bucks Horn Inn in Brantham about 1½ miles away. I had a glass of beer there and then visited a few other pubs (R 149). The last pub I visited was the Ark, which I left a little after closing time around 10:40 P. M. I drank only beer all evening—four or five pints in all (R 111). It is between 4½ and 5 miles from the Ark to the gate at AAF Station F-157.

turn which the accused returned to the post that night. It is five miles from that gate to the scene of the alleged crime (R 112). On the way towards East Bergnoff I reached a steep hill and got off my bicycle. An M. P. by the name of Partyka came up from behind and we continued along together. This was about 10:50 P.M. (R 112). We stopped about five minutes for a smoke and then came on to the base, riding along slowly. We reached the gate between 11:15 and 11:30 P.M. We then went to the Mess Hall for a sandwich and some coffee. I am positive it was not later than 11:30 that we reached the gate (R 113). I stayed in the Mess Hall until about 12 P. M., speaking to "all" the men who were there at that time. Then I went to my barracks (R 114). I never saw Miriam Cullum before the time of the identification parade. At the time she identified me in the line-up, a C. I. D. man was standing in front of me with his hand on my shoulder (R 114). I never saw Sheila Winifred Dale before the identification parade (R 115). I cut my hand with a cleaver while opening milk cans on 13 July, and I had Sgt. Pellafier put a band aid on (R 115, 116).

On cross-examination, the accused admitted that he had two teeth out, both on the left side of the mouth (R 116). He also admitted that he did not sign in the actual time he got to the Orderly Room. He "just put down 2400 or 2300" as I guess, this being the practice (R 120). He admitted that he chose his own place in the line-up on the occasion of the identity parade (R 121). The accused was riding a khaki colored bicycle (R 116). In her statement to the police, Miriam Cullum stated that her assailant was riding a khaki colored bicycle (Defense Exhibit B). The accused remembered the time before 12 P. M. on the particular evening from the fact that the radio was on in the Mess Hall and the fact that certain people were there who usually came in at a certain time. However, he testified as to his memory on the time after 12 o'clock as follows: "After 12 o'clock I am not sure of the time. There was no reason to remember the time after 12 o'clock. I was outside, there was no clock or anything" (R 119).

2. *Comments: a. Discussion of the evidence.*

An assault with intent to commit rape by an American soldier on Miriam Cullum on the night of 11 July 1944 around 11 P. M. was proved beyond any doubt. The facts as to the attack are almost identical with those in CM 233183, 1943 Bull. JAG, May 1943, Page 188. Here, as in that case, the soldier, a total stranger to the girl, forced his company upon her.

persisted in accompanying her home and on the way knocked her down and dragged her into an adjoining field, desisting only upon the approach of two people. The instant case, however, is even stronger than the one cited for the reason that we are not even left to any inference as to the intention of the attacker, since he made that clear to the girl by his own words as he dragged her off, "I am going to fuck you."

The record also makes out a clear case of the rape of Sheila Winifred Dale by an American soldier, at a spot very near where Miriam Cullum was attacked, and occurring a very short time after that attack. There was proof of sufficient resistance by the girl to negative any inference of consent. She testified that the soldier, a stranger to her, tried to accompany her home against her wishes, that he forced her off her bicycle in a lonely spot, that she ran away from him but that he caught up with her, seized her and dragged her into an adjoining field in spite of her struggles, stopped her screams with threats to kill her, and then, while she was in a state of exhaustion and fright, completed the act of intercourse. Whatever intellectual misgivings may arise as to the sufficiency of the resistance offered by the girl from such small circumstances as the fact that her glasses did not come off during the struggle and that she did not kick him in the groin because she "didn't dare" for fear of killing him fade into insignificance when put in their proper place in the whole picture. "The extent and character of the resistance required of a woman to establish her lack of consent depend upon the circumstances and relative strength of the parties" (CM 236801, 1943, Bull. JAG, August 1943, page 310). The record shows that Sheila weighed only 112 pounds. The court had full opportunity to compare her size with the accused and judge their comparative strengths. The record fully justifies "the inference that she did not in fact consent, that accused had carnal knowledge of her by force, and that any lack of or cessation of resistance was attributable to her fear of great bodily injury or death" (CM 227809, 1942 Bull. JAG, December 1942, Page 363; and see also CM 236612, 1943 Bull. JAG, August 1943, Page 310; and Underhill's Criminal Evidence, Section 675). The girl also testified unequivocally that penetration occurred, and her description of the actions and words of the soldier while on top of her were inconsistent with any other explanation than that of completed intercourse. Further proof of penetration was the presence of seminal fluid on her genitals and the subsequent medical examination indicating pregnancy.

In the case of both girls, the fact of the attack was amply corroborated by the testimony of disinterested witnesses as to their physical condition practically immediately after the attack—in the case of Miriam Cullum, only a few moments after, and in the case of Sheila Dale, about 15 minutes after. Both were sobbing, shaking, hysterical and with their clothes dishevelled. The bruises and scratches on their persons furnished further corroboration. Finally, there was the strongest element of corroboration in the immediate complaint of both, by Miriam Cullum that "she had been attacked by a Yank", and by Sheila Dale that she "had been attacked by a sexual maniac."

The most serious question presented by the record is the identity of the attacker. It is believed, however, that it was proved beyond a reasonable doubt that the assailant in both cases was the accused. The morning after the attack on her, Sheila Dale described her attacker to the police, giving a description which the court found fitted the accused.

Several days later, Miriam Cullum described her at-
92 tacker to the police, which again the court found fitted the accused. Both girls independently and separately picked the accused out of a line-up of 16 soldiers at the accused's station as the man who had attacked them. Moreover, both girls gave a testimonial description of their attacker which fitted the accused, even to certain features not always visible like the missing teeth and the other teeth widely-spaced, and then identified the accused in open court as the man. Furthermore, they could not be shaken in their description on cross-examination. As Miriam Cullum testified, "I would never forget his face." There is also the corroborative circumstance of the scab from an incised wound on the accused's left hand, at the spot where Miriam Cullum testified she bit him. The accused explained this scab as resulting from a cut with a cleaver, but the constable who examined it stated that the scab was that of an incised wound rather than of an abrasion or cut. Finally, there is a significant circumstance that both attacks took place in practically the same spot, within a short time of each other, and that the pattern of action of the attacker was practically identical in both cases. The accused attempted to prove an alibi in that he was in the company of Private Partyka or in the Mess Hall at his station when the attacks took place. However all the testimony of the defense witnesses as to the times they saw the accused was indefinite, their estimates of the time being based on their

best judgment. It is significant that the accused signed in at his Orderly Room at 2300 hours, whereas by his own admission he did not get there before 12:30 P. M.; the guard at the gate testified positively that the accused entered the station not earlier than 11:30 P. M.; and none of the defense witnesses, except Partyka, testified that they saw him before 11:45 P. M. As for Partyka, he estimated the hour he met the accused from the time the pub closed, which he thought was 10 P. M., whereas actually the pub closed at 10:30 P. M. In addition, Partyka testified that on their way back to camp, the accused commented that he had been out with a girl, a fact which the accused omitted mentioning in his own testimony when he took the stand *before* Partyka. Furthermore, the court could easily have believed from the actions of the accused after he reached the station that he was deliberately attempting to establish an alibi. In this connection, it is to be noted that the accused testified that he spoke to "all" the men in the Mess Hall that night; and, although his memory of the time before 12 o'clock was exact, he testified that "there was no reason to remember the time after 12 o'clock". Accused's conduct with respect to the cut on his hand two days later also suggests a purpose of establishing an alibi. At any rate, the court heard both the prosecuting and the defense witnesses and the accused, and the members of the court were the best judges of their credibility.

b. *Irregularities:* It was error for the Law Member not to permit Sheila Dale's mother, her sister and an American soldier who was present at the time to testify as to the complaint of being raped made by Sheila as soon as she arrived home. Similarly, it was error not to permit Miriam Cullum's father to testify as to the complaint made by her when she arrived home. Both complaints were made at the earliest opportunity, while both girls were still visibly affected by the attack, and were clearly admissible as exceptions to the hearsay rule (MCM 1928, paragraph 115*a*, Page 118; Underhill's Criminal Evidence, Section 667; CM 228891, 1943 Bull. JAG, January 1943, Page 8; Wharton's Criminal Evidence, Page 989). It is also questionable whether the ruling of the Law Member was correct in admitting testimony of the reputation of Sheila in the community for chastity, since the question of consent was not put in issue by the defense (Underhill's Criminal Evidence, Section 676; Wharton's Criminal Evidence, Page 732). However, both these rulings were clearly in favor of the accused and no possible prejudice could have resulted to

him. The prejudice to the prosecution's case was minimized, since both prosecutrix with [illegible] were compelled to testify as to the complaints made by them, and other witnesses testified to the physical condition of the girls after the attacks.

It was, perhaps, an irregularity for the court, over the objection of the defense, to permit the two girls to be present during the summations. However, the defense's objection was based on possible facial expressions and gestures by the girls which might improperly influence the court, and it may be safely assumed from the lack of objection by Defense Counsel after the summations that no such improprieties occurred. The practice of having a prosecuting witness sit in court during any part of the proceedings is not forbidden by the Manual, and it is certainly the general practice in civil criminal cases, so that at most it was a harmless irregularity.

The Defense made strenuous objection to any testimony regarding the identification by the two girls of the accused in the identity parade held at the accused's station a week after the attacks. It would seem hardly to require argument that it was highly relevant and material that both girls separately and independently, were able immediately to pick the accused out of a line-up of 16 men in which the accused was not conspicuously placed and of which he was a representative example. A test of the competency of this line of testimony is to ask the question whether or not, if the girls had picked a man other than the accused as their attacker, the defense could properly have proved that fact in its case. Obviously, the testimony would be admissible, and no reason is apparent why the same rule should not apply in the reverse situation. Underhill's Criminal Evidence, page 1267, states that it has been "held proper to ask a witness how soon after the arrest the defendant was identified by the prosecutrix, where his identity was one of the main questions", citing *State v. Jeffcoat*, 192 N. Car. 318, 135 S. E. 22. But even if error was committed, it was harmless in view of the positive identification of the accused in open court.

c. Prejudicial Errors: The record is legally sufficient to support the findings and sentence. There are no errors prejudicial to the substantial rights of the accused, and the sentence is the mandatory sentence required by Article of War 42.

d. *Miscellaneous:* In civil life, the accused was a resident of Syracuse, New York. He enlisted at Syracuse, New York, on 2 May 1942. Although he had had no prior service in the army, he was in the United States Navy from 11 May 1928 to 11 May 1932, the character of his discharge being undesirable. His civilian occupation was a sheet metal worker. He is married and has one illegitimate child and two stepchildren. He is a high school graduate. His AGCT score was 112, putting him in Group II. His service record does not reveal any record of criminal convictions in civil life. His character ratings from the date of enlistment are given as Unknown, Poor, and Excellent. The service record gives his efficiency ratings as Not Observed, Unknown and Satisfactory. Although only one previous conviction by court-martial could properly be considered by the court, that being for 5 days AWOL, the service record shows three other previous convictions for AWOL, from 13 September to 21 October 1942; from 1 January 1943 to 9 February 1943; and from 2 April to 14 April 1943.

Prior to the trial of this case, the accused was sent to the 221st Station Hospital, APO 69, U. S. Army for psychiatric examination. The diagnosis of his case was "constitutional psychopathic state; inadequate personality". The report goes on to state, "The cross section study of his entire mental life shows that he is an emotionally unstable individual, with poor judgment, limited ability to learn from experience, and a poorly-developed sense of responsibility." The conclusion was reached, however, that the soldier was not mentally defective, nor did he give any evidence of being mentally insane in the past or at the time of the crimes charged; that he could differentiate between right and wrong and was responsible for his actions.

e. *Clemency:* No clemency was recommended by the court and none is recommended at this time. The two attacks made by the accused in such quick sequence mark him as a dangerous sexual criminal, and his past record does not argue in favor of clemency.

94 3. *Recommendations:* It is recommended that the sentence be approved, but that the execution be withheld, pending action under Article of War 50½ by the Branch Office of the Judge Advocate General in this theatre. The following action is suggested, pending notification from the Board of Review that the sentence may be ordered executed:

"In the foregoing case of Private Bernard W. Smith, 32286877, Headquarters Detachment, 353rd Fighter Group, the sentence is approved. The United States Penitentiary at Lewisburg, Pennsylvania, is designated as the place of confinement. Pursuant to Article of War 50½ the order directing the execution of the sentence is withheld."

RICHARD J. KENT,
Captain, J. A. G. D.,
Ass't. Staff Judge Advocate.

I concur in the foregoing review and the recommendations contained therein.

BURTON S. HILL,
Lt. Col., J. A. G. D.,
Staff Judge Advocate.
13 August 1944.

95

To: Trial Judge Advocate of General Courts Martial appointed per Par. 1, Special Order No. 195, Headquarters VIII Fighter Command, 9 August 1944.

1. The accused, Private Bernard W. Smith, Headquarters Detachment, 353rd Fighter Group, AAF Station F-157, having been served with a copy of the charge sheet in this case on 12 August 1944 requests, through his regularly appointed defense counsel, a delay of ten (10) days as to the date of trial in order to properly investigate the facts and to prepare his defense.

WILLIAM KAPELMAN,
Captain, Air Corps,
Defense Counsel.

96

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CHARGE SHEET

AAF STATION F-157, APO 637, 19 July, 1944.
(Place) (Date)

Name, etc., of accused Smith, Bernard W. 32286877 Pvt
(Give last name, first name, and middle initial
Hq. Det. 353rd Fighter Group, APO 637, AAF Station
in that order followed by serial number, grade, company, regiment, arm or
F-157, U. S. Army.
service, or by other appropriate description of accused. Alias names, etc., to follow in same manner)

Age 33 yrs 4 mos Pay, $60.00 per month. Allotments to (Base pay plus pay for length of service)
Class "F" $22.00
dependents, $..... per month.
Class "E" None

Government Insurance deduction, $7.25 per month.

Data as to service: Prior Service: U. S. Navy—11 May 1928 to 11 May 1932 (Character of discharge: Undesirable) Current Enlistment: Enlisted at Syracuse, New York, 2 May 1942 for the duration of war plus six months. (As to each terminated enlistment, give including dates of service and organization in which serving at termination. As to current enlistment, give the initial date and the term thereof. Give similar data as to service not under an enlistment)

Data as to witnesses, etc.: ..... (Give names, addresses, and note if for

Against the Accused: accused. List documentary evidence and note where each item thereof may be found)

1. Sheila Winifred Dale
   Victoria Cottages
   Station Road,
   Lawford, Essex.
2. Miriam Florence Cullum
   57 Colchester Road,
   Lawford, Essex.

For the Accused: None

Documentary Evidence: None

Entries on page one hereon pertaining to the accused have been verified by the undersigned.

ERNEST P. MACGREGOR
Captain, Air Corps.
Commanding.

Data as to restraint of accused: Placed in confinement at (Give date, place, and initial date of any restraint of accused)
Station guardhouse, AAF Station F-157, 1600 hours, 18 July 1944.

97 CHARGE I: Violation of the 92nd Article of War.

Specification: In that Private Bernard W. Smith, Headquarters Detachment 353rd Fighter Group E.F.M. did at Ipswich-Manning Tree Road, Lawford, Essex, England, on or about 11 July

1944 forcibly and feloniously, against her will, have carnal knowledge of Sheila Winifred Dale age 20, Victoria Cottages Station Road, Lawford, Essex.

CHARGE II: Violation of the 93rd Article of War.

E.P.M. E.P.M.

~~Specification: In that Private Bernard W. Smith, did at Ipswich-Manning Tree Road, on or about 11 July 1944 with an intent to commit a felony, viz: to have unlawful carnal knowledge of Miriam Florence Cullum, commit an assault upon Miriam Florence Cullum age 19, 57 Colchester Road, Lawford, Essex, by forcibly dragging her from the highway into a field, hitting her with his fist on the head, taking hold of her throat with his hands and kicking her in the back with his foot.~~

E.P.M E.P.M.

Specification: In that Private Bernard W. Smith, Headquarters Detachment 353rd Fighter Group, did, at Ipswich-Manning Tree Road, Lawford, Essex, England, on or about 11 July, 1944, with intent to commit a felony, viz, rape, commit an assault upon Miriam Florence Cullum, 57 Colchester Road, Lawford, Essex, England, by willfully and feloniously dragging her from the highway into a field, hitting her with his fist on the head, taking hold of her throat with his hands and kicking her in the back with his foot.

(Additional sheets, if necessary, for charges and specifications will be attached here. Ordinary 8 by 12½-inch paper will be used for additional sheets)

(2)

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VOS

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(Signature of accuser) ERNEST P. MACGREGOR
Captain, AC., Hq. Det.
353 Fighter Group,
(Grade, organization, arm or service)

AFFIDAVIT

Before me, the undersigned, authorized by law to administer oaths in cases of this character, personally appeared the above named accuser this 12th day of July, 1944, and made oath that he is a person subject to military law and that he personally signed the foregoing charges and specifications, and further that he ~~has personal knowledge of the matters set forth in specifications~~ .....
(Indicate by specification and charge numbers)
.....; ~~and/or~~* has investigated the matters set forth in ~~specifications~~ the Specification of Charge I and Charge I and Specification of Charge II and Charge II and that the same are true in fact, to the best of his knowledge and belief.

(Signature) RALPH A. JOHNSON CAPT AC
(Grade and organization)
Adjutant AAF Station F-157
(Official character, as summary court, notary public, etc.)

NOTES.—At (*) strike out words not applicable.
If the accuser has personal knowledge of the facts stated in one or more specifications or parts thereof, and his knowledge as to other specifications or parts thereof is derived from investigation of the facts, the form of the oath will be varied accordingly. In no case will he be permitted to state alternatively as to any particular charge or specification, that he either has personal knowledge or has investigated.
If the oath is administered by a civil officer having a seal, his official seal should be affixed.

1st IND.

Headquarters VIII FIGHTER COMMAND, AAF STATION F-341, APO 637, 9 August, 1944
(Place) (Date)

Referred for trial to Capt. Harley J. McNeal, Trial Judge Advocate.
(Grade, name, and organization of summary court, or trial judge advocate)

General court-martial appointed by paragraph 1, Special Orders No. 195 Headquarters VIII FIGHTER COMMAND
(Summary) (Trial judge advocate of special or general)
9 August, 1944

By Command of Brigadier General Griswold:
(Command or order) (Grade and name of commanding officer)

W. T. DURKOF, *Adjutant.*
W. T. DURKOF,
Major AGD.
Asst. Adj Gen.

99 I have served a copy hereof on (each of) the above-named accused, this 12th day of August, 1944.

(Signature) HARLEY J. MCNEAL, *Trial Judge Advocate.*
Capt J A G D
(Grade and organization)

(Space for use Where Trial is by Summary Court)
CASE NO. .....

Specifications and Charges	*Pleas*	*Findings*	*Sentence or Acquittal and Remarks*

Place ....., Date ....., 19....
..... Summary Court.
(Signature, grade and organization)
Headquarters ....., 19....
(Place and Date)
.....
(Action of reviewing authority)
..... *Commanding.*
(Signature, grade and organization)
Entered on service record in cases of conviction .....
(Initials of personnel adjutant)

(4)

Hq SOS USAPP 9-43/50M/15116
(Write Nothing Below this Line)

100 HEADQUARTERS N-V (G-21)
VIII FIGHTER COMMAND
Office of the Staff Judge Advocate
APO 637, AAF Station F-341

7 August, 1944.

SUBJECT: Advice of Staff Judge Advocate.
To : Commanding General, VIII Fighter Command.

1. The attached charges have been referred to me for consideration and advice under the provisions of Article of War 70 and paragraph 35b MCM.

2. I have carefully examined and considered the charges and accompanying papers, including the report of investigation made in compliance with Article of War 70, and submit herewith my report and recommendations:

3. *Personal Data concerning the accused:*

a. *Smith, Bernard W., 32286377, Private. Headquarters, 353rd Fighter Group.*

b. Age: 33 years, 4 months.

c. Total Service: 2 years, 3 months. Also 4 years service in U. S. Navy from 11 May 1928 to 11 May 1932. Character of discharge: Undesirable.

d. Character of prior service: Fair.

e. Previous convictions: One.

4. *Summary of Charges:*

A.W.	*Gist of specifications:*
92	Rape of 20-year old British girl.
93	Assault with intent to commit rape on 19-year old British girl.

5. *Maximum Sentence:*

Mandatory punishment of death or life imprisonment

6. The specifications allege, in correct form, offenses under the Articles of War alleged to have been violated and are appropriate to the indicated evidence in the case. In my opinion, a *prima facie* case exists, justifying trial upon the specifications and charges. There is nothing in the papers to indicate any reason for doubt of the sanity of the accused at the time of offense or at present. In view of the gravity of the charges, the accused was given a neuro-psychiatric examination at the 121st Station Hospital, the report of which states that the accused, although "an emotionally unstable individual, with poor judgment", is nevertheless "not mentally defective, nor has he presented any evidence of being mentally insane in the past, nor at the time of the alleged charge."

7. It is recommended that the charges be referred for trial to a general court-martial.

BURTON S. HILL,
Lt. Col., J. A. G. D.,
Staff Judge Advocate.

101 CONFIDENTIAL

15th M. P. CRIMINAL INVESTIGATION SECTION
APO 559, U. S. Army BES bs

23 July 1944.

SUBJECT : Report of Investigation.
TO : C.G., 8th Fighter Command, APO 637, U. S. Army.
THROUGH : Provost Marshal, 8th Fighter Command, APO 637, U. S. Army.

1. Herewith submitted is report of investigation conducted by the Criminal Investigation Division in the matter of Pvt. Bernard W. Smith, ASN 32286877, Hq. Det. 353 Fighter Group, APO 637, U. S. Army.

BART E. SULLIVAN
2nd Lt., CMP
Comdg. Dist.

Received
28 Jul 1944
Headquarters 8th
Fighter Command

102 CONFIDENTIAL

CRIMINAL INVESTIGATION DIVISION
SERVICES OF SUPPLY, UNITED STATES ARMY
EUROPEAN THEATER OF OPERATIONS

(1) FILE:	(2) TITLE: Rape Assault with Intent to Commit Rape Pvt. BERNARD WILLIAM SMITH ASN 32286877, Hq. Det. 353 Fighter Group, APO 637, U. S. Army. VICTIMS: SHEILA WINIFRED DALE Victoria Cottages, Station Road, Lawford, Essex. MIRIAM FLORENCE CULLUM No. 57, Colchester Road, Lawford, Essex.
(3) AUTHORITY: VO, TPM.	
(4) BASIS: Investigation requested on 13 July 1944 by Capt. Henry A. Foster, APM, 1192nd M.P. Co. Avn., Det. B, APO 559, U. S. Army.	
(5) DATE: 13 July 1944.	
(6) AGENTS ASSIGNED: Bertram Sussman Alexander Springer Agents, C.I.D.	(7) STATUS: Pending

(8) WITNESSES:

1—Sheila Winifred Dale, Victoria Cottages, Station Road, Lawford, Essex.

2—Miriam Florence Cullum, No. 57, Colchester Road, Lawford, Essex.

3—Pamela Joy Dale, Victoria Cottages, Station Road, Lawford, Essex.

4—Ellen May Dale, Victoria Cottages, Station Road, Lawford, Essex.

5—Betty Goodall, No. 45, Peel Road, Wembley, Middlesex.

6—Frank Albert Welham, "Bibury", Harwich Road, Lawford, Essex.

7—Wilfred John Felton, P. C. 305, Mistley Police, Mistley, Essex.

8—Dr. Frederick H. E. Beckett, High Street, Manningtree, Essex.

9—Sgt. Joseph Pelletier, ASN 11050769, 351 Ftr. Sq., APO 637, U. S. Army.

CONFIDENTIAL

103 (9) LIST OF EXHIBITS:

A—Statement of Sheila Winifred Dale, dated 12 July 1944.

B—Statement of Miriam Florence Cullum, dated 17 July 1944.

C—Statement of Pamela Joy Dale, dated 13 July 1944.

D—Statement of Ellen May Dale, dated 12 July 1944.

E—Statement of Betty Goodall, dated 13 July 1944.

F—Statement of Frank A. Welham, dated 17 July 1944.

G—Statement of Wilfred J. Felton, P. C. 305, undated.

H—Statement of Dr. Frederick H. E. Beckett, dated 12 July 1944.

I—Statement of Pvt. Bernard W. Smith, dated 18 July 1944.

J—Statement of Sgt. Joseph Pelletier, dated 19 July 1944.

K—Clothing of Sheila W. Dale, in possession of Mistley Police, now being scientifically tested in the Police Laboratories.

(10) PROGRESS:

On 13 July 1944, this office was informed by Capt. Henry A. Foster, APM, 1192nd M. P. Co. Avn., Det. B, APO 559, U. S. Army, that a rape had been reported in Lawford, Essex.

On 13 July 1944, these agents contacted the civil police at Mistley, Essex, and in the company of P. C. W. J. Felton and Det. Constable Chaplin of the Essex County Constabulary, visited the scene of the alleged rape, and interviewed the owner of the Bucks Horns P. H., Brantham, Suffolk.

On 13 July 1944, these agents, accompanied by P. C. Felton and Det. Con. Chaplin, proceeded to the B. X. Plastics Factory, Brantham, Suffolk, where Pamela Joy Dale, Victoria Cottages, Station Road, Lawford, Essex, was interviewed and statement obtained by P. C. Felton.

On 13 July 1944, these agents proceeded to Victoria Cottages, Station Road, Lawford, Essex, where Sheila Winifred Dale, the complainant, was interviewed, and arrangements made to have her keep an appointment made with an unknown American soldier at Brantham, Suffolk.

On 13 July 1944, these agents proceeded to Brantham, Suffolk in the company of P. C. Felton and Det. Con. Chaplin, and observed the place of appointment but no American soldier kept the appointment.

On 18 July 1944, these agents were informed by P. C. Felton of an assault upon Miriam Florence Cullum, No. 57, Colchester Road, Lawford, Essex, on 11 July 1944 in Lawford, Essex.

On 18 July 1944, these agents attended an identification parade at Station 157, U. S. Army, where Sheila W. Dale and Miriam F. Cullum in the presence of P. C. Felton, Det. Con. Chaplin and Captain MacGregor, Hq. Det., 353 Ftr. Gp., APO 637, U. S. Army, identified Pvt. Bernard William Smith, ASN 32286877, Hq. Det., 353 Ftr. Gp., APO 637, U. S. Army as their assailant.

On 18 July 1944, these agents interviewed and obtained statement from Pvt. Bernard W. Smith. (Exhibit 1).

On 19 July 1944, these agents proceeded to Station 157 and interviewed Sgt. Donald Roy Callender, ASN 35407790; Sgt. Arnold Larson, ASN 36328803;
104 and Sgt. Roy J. Grant, ASN 14123836; and interviewed and obtained statement from Sgt. Joseph Pelletier, ASN 11050769, all of the 351 Ftr. Sq., APO 637, U. S. Army. (Exhibit J).

On 19 July 1944, these agents proceeded to the Mistley Police Station, Essex, and arranged to have the

statements of the civilian witnesses forwarded to this office.

On 22 July 1944, these agents obtained from the Essex County Constabulary the statements of Sheila W. Dale; Miriam F. Cullum; Pamela Joy Dale; Ellen May Dale, Victoria Cottages, Station Road, Lawford, Essex; Betty Goodall, No. 45, Peel Road, Wembley, Middlesex; Frank A. Welham, "Bibury", Harwich Road, Lawford, Essex; Wilfred J. Felton, P. C. 305, Mistley, Essex; and Dr. Frederick H. E. Beckett, High Street, Manningtree, Essex. (Exhibits A, B, C, D, E, F, G, & H).

(11) STATEMENT OF FACTS:

On or about 11 July 1944, at approximately 2330 hours, Miss Sheila W. Dale, Victoria Cottages, Station Road, Lawford, Essex, while cycling on the Ipswich Road, Lawford, Essex, was accosted by an American soldier who forced her to have sexual intercourse with him without her consent. (Exhibits A, C, D, E, G, H & K).

On 18 July 1944, Miss Sheila W. Dale identified Pvt. Bernard W. Smith, ASN 32286877, Hq. Det., 353 Fighter Group, APO 637, U. S. Army, as her assailant. (Exhibits A, G & I).

On or about 11 July 1944, at approximately 2300 hours, Miss Miriam F. Cullum, No. 57, Colchester Road, Lawford, Essex, was accosted by an American soldier on the Ipswich Road, Lawford, Essex, who assaulted Miss Miriam F. Cullum with intent to commit rape upon her. (Exhibits B, F & G).

On 18 July 1944, Miss Miriam F. Cullum identified Pvt. Bernard W. Smith as her assailant. (Exhibits B, G & I).

Pvt. Bernard W. Smith denies having committed any offense against Miss Sheila W. Dale and Miss Miriam F. Cullum and claims he was at his base at the time of the assaults. (Exhibits I & J).

Pvt. Bernard W. Smith is presently confined to the Guardhouse at Station 157, U. S. Army.

(12) SIGNED:

BERTRAM SUSSMAN,
Agent, C. I. D.

ALEXANDER SPRINGER,
Agent, C. I. D.

105 (13) FORWARDED:
BART E. SULLIVAN,
2nd Lt., CMP,
Comdg. Dist.

(14) DISTRIBUTION:
Original: C. G., 8th Fighter Command, APO 637, U. S. Army.
2 Copies: C. G., 8th Air Force, APO 634, U. S. Army.
Copy : TPM, ETOUSA, APO 887, U. S. Army.
Copy : C. O., Hq. Det., 353 Fighter Group, APO 637, U. S. Army.

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106 PRETRIAL INVESTIGATING OFFICER'S REPORT

AAF Station F-157, APO 637, U. S. Army

24 July 1944.

Subject: INVESTIGATION OF CHARGES.
To: Commanding Officer, AAF Station F-157, APO 637, U. S. Army.

1. I have investigated the inclosed charges dated 19 July 1944 against Bernard W. Smith, 32286877, Pvt. Hq. Det., 353rd Fighter Group, APO 637, U. S. Army in accordance with the provisions of Article of War 70 and paragraph 35*a*, Manual for Courts-Martial. At the outset of the investigations, I informed the accused of the nature of the charges alleged against him; of the names of the accuser and witnesses, so far as known to me; of the fact that the charges were about to be investigated; of his right to cross-examine all available witnesses against him and to present anything he may desire in his own behalf, either in defense or mitigation; of his right to have the investigating officer examine available witnesses requested by him; and that it was not necessary for him to make any statement with reference to the charges against him, but that if he did make one it might be used against him.

2. In the presence of the accused, I have examined the following-named
~~all available~~ witnesses and documentary evidence and have reduced the material testimony given by each witness, under direct and cross examination, to a statement embodying the substance of the testimony taken on both sides, which said statement is attached hereto as hereinafter indicated:
FOR THE ACCUSED: As shown on Exhibit A.
The following two witnesses against the accused were examined by me in his presence and he was allowed to ex-

amine and cross-examine them with my assistance: Miriam Florence Cullum and Sheila Winifred Dale. Their testimony substantiated their statements shown on Exhibit B, with additional matter as shown on Exhibit C.

3. The substance of the expected testimony of the following-named witnesses ~~either~~ in ~~oral or~~ written form was made known to the accused who stated he did not desire to cross-examine such witnesses and therefore the same were not called or examined in the presence of the accused.

Frank Albert Welham, Pamela Joy Dale, Mrs. Ellen May Dale, Frederick Harry Eli Beckett, Betty Goodall, Wilfred John Felton. Statements of these witnesses are included in Exhibit B.

4. The following documents have been examined, shown to the accused, and are appended:

Exhibits A, B, and C

107 5. The accused, after he had been carefully warned by me as above indicated, * said that he did not desire to make a statement.—~~or~~—* ~~made the statement hereto attached.~~ (Ex. .....).

*Strike out words not applicable.

6. Explanatory or extenuating circumstances: None.

7. There is no reasonable ground for a belief that the accused is now, or was at the time of the commission of the alleged offense(s), mentally defective, deranged, or abnormal.

8. Trial by General Court Martial is accordingly recommended.

9. There is attached a record of one previous convictions committed during the current enlistment and within one year preceding the commission of the offense for which the accused is now charged. (Par. 79, MCM.)

10. In arriving at my conclusions, I have considered not only the nature of the offenses and the evidence in this case, but I have likewise considered the age of the accused, his military service, the necessity for preserving the manpower of the Nation in the present emergency, of salvaging all possible military material, and the established policy of the War Department that trial by general court martial will be resorted to only when the charges can be disposed of in no other manner consistent with military discipline.

ALAN B. TODD,
(Signature)

ALAN B. TODD.
(Name, typed)

1st Lt. Inf.
Det "A", 1260th Military Police Co. (Avn).
(Grade and organization)

108 EXHIBIT "A".

The following witnesses requested by accused were duly sworn and testified, in substance, on 21 July 1944 as follows:

Sgt Donald R. Callendar, ASN 35407790

That he is a cook in the mess hall of the 351st Fighter Squadron and has known the accused pretty well for the past three months, and has been acquainted with him for about a year. That he was not on duty on the night of 11 July 1944, and went to his barracks which adjoins the mess hall, after supper, although he is not sure of the time. That he was in bed in his barracks between 2200 hours and 2400 hours that night and remembers seeing the accused come in and talk to Sgt Pelletier about a date they had in Ipswich the following night. That he does not remember what time it was but is pretty sure it was after 2200 hours.

Cpl William E. Sterman, ASN 12040220

That he has known the accused since April 1943. That he was on duty in the Orderly Room of his organization as Charge of Quarters on the night of 11 July 1944. That he does not remember seeing Private Smith at all that night, either signing out or signing in, although it is quite possible that accused may have done so without his seeing him or remembering that he saw him if he did in fact see him since many men of the organization sign out and in during pass hours.

Sgt Joseph C. Pelletier, ASN 11050769

That he is a cook in the mess hall of the 351st Fighter Squadron and has known the accused for about 14 months. That he came off duty about 1900 hours on the night of 11 July 1944 and went to the Red Cross for a while and then returned to his barracks which adjoin the mess hall. That so far as he remembers he went to bed about 2200 hours and that Private Smith came in sometime later, he thinks about 2315. He fixes this approximate time in his mind because accused talked to him about 15 or 20 minutes about their dates in Ipswich the next night and then went back into the kitchen and about 15 minutes later the midnight news broadcast came on the radio. That Private Smith did not discuss with him where he had been that night.

1st Sgt Robert A. Hayes, ASN 12036859

That he knows the accused who works as a cook in the kitchen of the 351st Fighter Squadron. That he did remember seeing Private Smith in the kitchen of the mess hall with a soldier he didn't know one night last week and he thinks it was the night of Tuesday 11 July 1944, because that was a night he went to a Pub in Dedham. That he was in the kitchen when accused came in from the outside with the other soldier, and as far as he can remember it was between 2300 and 2400 hours, and probably closer to 2400.

Sgt Roy J. Grant, ASN 14123836

That he is a cook in the mess hall of the 351st Fighter Squadron and that he has known the accused for about nine months. That he came off duty in the mess hall about 1900 hours on 11 July 1944, and went to his barracks which is connected to the mess hall. That he does not remember whether he went back into the kitchen again that night and does not remember having seen accused that night, although it is usually Private Smith's custom to go to the kitchen for something to eat after coming in off pass.

109 S/Sgt Joseph F. Rosinski, ASN 36339972

That he is a mechanic in the 351st Fighter Squadron and knows who the accused is but does not know him personally. That he does not remember whether he was in the mess hall on the night of 11 July 1944 or not. That he does go to the mess hall sometimes for something to eat after he works late at night.

Sgt John W. Johnson, ASN R-1239082

That he does not know the accused. That he was on duty in the Orderly Room of his organization on the night of 11 July 1944, and that he went to the mess hall for something to eat that night but does not remember the time. That he saw some men in the mess hall but does not remember who they were.

S/Sgt Joseph Perna, ASN 32278892

That he has known accused merely as an acquaintance for about 2 months. That he does not remember being in the mess hall of his organization on the night of 11 July 1944.

The following witnesses requested by accused were duly sworn and testified, in substance, on 22 July 1944 as follows: -

Pfc Harrison J. Wakely, ASN 31220055

That he was on duty as sentry at road gate #2 at AAF Station F-157, from 1800 hours to 2400 hours on 11 July 1944. That he remembers a soldier from his company, Private Andy Partyka coming through his gate in company with another soldier who he now recognizes as the accused. That it was almost 2400 hours when they came through the post and he fixes this time in his mind because it was just a few minutes afterwards that he started getting his equipment ready to go off post. That he is usually relieved from this shift about 2400 hours and sometimes before that. So far as he remembers it was after blackout time that accused and Partyka came through his post but they did not have their bicycle lights on, although he had to use his flashlight to check their passes. He does not think it could have been more than 20 minutes before he went off duty that accused came through his post. That accused asked Partyka to go to his (accused's) mess hall for something to eat, and does not think that either soldier was drunk.

S/Sgt Edward R. La Page, ASN 19000833

That he knows the accused who works in the mess hall of his organization. That on 11 July 1944, he went to the mess hall a little after 2200 hours with T/Sgt Stanley Pleban after returning from the PX. That he remembers the accused coming into the mess hall with another soldier whom he said was an M. P. and that some conversation in a light tone took place about this. That he does not remember the exact time accused and the M. P. came in but he thinks it was about a half hour or an hour after he and Pleban went to the mess hall.

Sgt Arnold A. Larson, ASN 36328803

That he is a cook and has known the accused for about two months and works with him in the mess hall of the 351st Fighter Squadron. That he has gone into the mess hall at night after returning from Ipswich almost every night for the past two weeks. That it is usually about 2400 or 0100 when he returns to the station from his pass. That he does not remember what he did on the night of 11 July 1944.

110 T/Sgt Stanley E. Pleban, ASN 33351538

That he knows the accused who works in the mess hall of his organization. That he remembers being in the mess hall with S/Sgt La Page on the night of 11 July 1944, when accused came in with a soldier who was an M. P. He think that it was sometime between 2230 and 2330 when they came in but he does not know exactly what time it was. It was probably about 2245 but he is not sure.

Pvt William Vandergrift, ASN 33598365

That he is acquainted with Winifred Dale of Victoria Cottages, Lawford. That on the night of 11 July 1944 he was visiting a young lady who lives 3 or 4 doors from Miss Dale and that at about 2345 hours Winifred Dale's sister Pamela came to the house where he was and asked him to go to her home as "Winnie" was crying. That he went there and found Winifred Dale who was crying and that she told him she and her sister Pamela had been out with their boy friends. That Pamela had gone on home ahead of her and that she had started a little later and as she came near a bridge between Brantham and Manningtree an American soldier had stopped her and took her by the throat and threw her off her cycle. That he told her if she didn't "come across" with what he wanted he was going to kill her. That the soldier took her bike and threw it over a hedge. That he assumed the soldier got what he wanted. That Winifred Dale told him the soldier made her promise that she would meet him on the bridge the following Thursday night. That she said there were two other soldiers who came along right after the soldier assaulted her and that he left then.

The following witnesses requested by the accused were duly sworn and testified, in substance, on 23 July 1944 as follows:

Pvt Andy (nmi) Partyka, ASN 33677026

That he has not known the accused but now recognizes him as the soldier he rode back to the station with on the night of 11 July 1944. That he went on pass that night about 1930 hours and rode his bicycle to Manningtree to a Pub. That he drank about 6 or 7 pints of beer and left to come back about 2230 or 2240. That as he was cycling up the hill from Brant-

ham he caught up with accused, also going back to camp and they rode in together. That they stopped for about 5 minutes in E. Bergholt to have a smoke. That they then rode right back to camp without stopping and got to Gate Post #2 about 2300 hours. That accused asked him to go to his mess hall for something to eat, which they did. That they stayed there about 15 minutes and then he (Partyka) went to his own company and he thinks he signed in. That it was getting dark when he got there.

That about 5 minutes after they reached the mess hall about 4 or 5 men came in, who seemed to be coming in off pass. That he did not talk to these men. That there were 2 cooks in the kitchen when they went in but no one in the mess hall.

That accused told him he had had his girl from Ipswich out that night, but did not say anything about being in Manningtree.

That when they got to the mess hall accused got him a salami sandwich and some coffee. That he asked one of the men who came in what time it was but does not remember what time he told him.

That accused did not appear to him to be drunk. That they did not use their lights on their bikes but when they got to the gate post the sentry used his flashlight to check their passes.

That it usually takes him 20 or 25 minutes to ride back to the station by himself from Manningtree and perhaps a little longer when he is with someone.

111 Cpl. William N. Prettyman, ASN 32079010

That he is a cook in the mess hall of the 351st Fighter Squadron and has known the accused merely as an acquaintance for about a month. That he was on duty in the mess hall on 11 July 1944 from 2030 hours until 0230 hours the next morning. That he remembers seeing the accused come into the kitchen that night to cook a hamburger and that it was after 2200 hours because he remembers just having finished fixing the first two pans of meat for the next day. That he thinks he started fixing the meat about 2200 hours and it usually takes him about an hour to fix all the meat. It was before the guards came in to be fed that he saw accused. The guards start coming in about 0030 or 0100 to be fed.

112 EXHIBIT "B"

Original statements in the pocket book of P.c. 305 r—m, Pages Nos. — 137, and 142. taken at 7 P.M. 17.7.44 at No. 57, Colchester Rd, Lawford, and at 7.45 p.m. 18.7.44 at Raydon Aerodrome, respectively.

Certified True Copy.

s/E. W. SHIPHERD
Detective Sergeant.

A TRUE COPY
ALAN B. TODD.
1st Lt. Inf.

STATEMENT of FRANK ALBERT WELHAM, age 35, of "Bibury", Harwich Road, Lawford. Works Foreman,
Who saith:

At about 11.40 p.m. on Tuesday, 11th, July, 1944 I was cycling along the Ipswich Road, Brantham towards Lawford. I was accompanied by a regular soldier. Bdr. C.N. Carter, of the 330th, Searchlight Batt., Lawford our Home Guard instructor. About half way between the two bridges an American soldier passed us going towards Brantham. I did not take particular notice of him.

When we got opposite Marsh Cottoge, we saw the lady's cycle lying beside the road. We heard someone crying and found a girl lying in the long grass. She made a complaint that she had been assaulted by an American soldier. Her clothing was disarranged and covered with dust. The soldier escorted the girl home to Lawford. No other American soldier passed us between the one we saw between the bridges and the girl. I cannot describe him.

s/D. J. Felton (Witness) (Signed) F. A. WELHAM
Pc. 305 Mistley. Original statement in the pocket book of Pc. Felton Pages 138-139 taken at 7.30.p.m. 17.7.44 at "Bibury", Harwich Road, Lawford.

Certified True Copy.

E. W. SHEPERD.
Det/Sergt.

A TRUE COPY
ALAN B. TODD,
1st Lt. Inf.

STATEMENT OF SHEILA WINIFRED DARE, N.R.I.C. TXKK. 65.5. Factory Hand, age 20, of Victoria Cottages, Station Road, Lawford. States on 12.7.44:-

At 8.45 pm. on Tuesday, 11th. July, 1944, I returned from Ipswich to Manningtree by train. I was with my sister Rita. We walked home from the station. I stayed at home and at 9.20.pm. my sister Pam came in with two American soldiers who I know as Kentucky and California. I do not know their proper names. They stayed in the house until about 10.30 pm. when Pamela and I decided to cycle as far as Bergholt with them. When we got to Bergholt we all stopped. We separated and I went along the road with Kentucky for about 50 yards and stood talking to him. After about 10 minutes my sister shouted out to me that she was going home and shortly afterwards the soldier California went passed riding his cycle. I left Kentucky and started to ride home. While I was with Kentucky I had no sexual relations with him and never have.

Just before I got to the Bucks Horns P. H., Brantham I saw an American soldier riding a cycle towards Bergholt. It was getting dark and I was walking as I had no lamps. As the soldier got near me he said, "Are you going home how far are you
113 going?" I did not answer him. He then turned round and cycled slowly beside me. He got off near the brick bridge near the river and said, "How much farther have you got to go?" I said, "Not far". He said, "Manningtree?" I said, "Yes". He then said, "You have got to stop here". I said, "I am not going to stop". I could smell he had been drinking. To get away from him I got on my cycle and rode along the Ipswich Road towards Manningtree Railway Station. He started to cycle beside me and said, "I am going to see you home".

When we got to the footpath which leads from the Ipswich Road into Station Road he said, "You can take a short cut that way". I said, "No, I cannot get home that way". About 100 yards further down the road he said, "You have got to stop here whether you like it or not". He got off his cycle and shook the handle-bars of my cycle. I fell off and the soldier dropped his cycle in the road. He threw mine in the long grass beside the road. He then put his cycle in the grass.

I started to run away, he ran after me, and pulled me onto the grass and pushed me down. I said, "If you don't let me go my father will come along in a minute". I made more excuses to try to get away and said "The grass will spoil my clothes". He said "I will take me coat off". I then managed to get up and ran away screaming. He ran after me and pushed me down again. He put his hands around my neck and said, "If you don't shut up I will murder you. I am not going to hurt you". He pulled my skirt up and tried to pull my knickers off. I struggled and screamed but he managed to pull them off one leg. He put one hand over my mouth and pulled one of my legs apart. He laid on that one and pulled the other one open. He put his mouth on my private parts and I could feel him sucking me. All the time I was trying to get away and screaming. He did this for some time. He then stopped and laid on top of me. I screamed and said "I will see you another night". He would not let me go. I then felt his person being put in my private parts. I cannot remember seeing him take it out of his trousers. I started to scream again and he said, "If you don't stop screaming I will hurt you more". He then started saying "Fucking lovely cunt". During this time he was moving up and down on top of me and I could feel his person moving in my private parts. After a while he got off and I could feel some fluid on top of my legs and private parts.

The soldier got up and buttoned his trousers and coat up. I did not see his person. I got up and pulled my knickers up and my skirt down. I said, "Will you get my cycle?" He went and got it and said, "Do you want me to see you home?". I said, "No, I will go home alone". He said, "Will you see me again?" I said, "Yes", so that I could away. He said, "Will you make it Thursday?" I said "What time?" He said, "Seven O'clock on the bridge over there, make it the second bridge".

He then let me go home and on the way I did not pass anybody. I got indoors just after twelve. I have never seen this soldier before. He was about 5'10", fair hair, round faced, American soldier's uniform, no hat, teeth widely spaced, with some missing at the top left. I feel sure that I could recognize

him again. I cannot describe his cycle. It is not the first time a man has had intercourse with me. When I got home, I complained to my mother.

114 At 7.15 p.m. on Tuesday 18th July, 1944, I attended an identification parade at Raydon Aerodrome. I picked a man out, who was paraded with fifteen other men, as the one who had asaulted me on Tuesday 11th July, 1944. I had not seen this man between the day of the assault and the identification parade s/

D. J. Felton (Witness) (Signed) S. W. Dale
P. c. 305, Mistley.

Original statements in the pocket book of P.c. 305 Felton, Pages Nos. 112-119, and 141, taken at 10.30 am. 12.7.44. at Dr. Beckett's Surgery, Manningtree, and at 7.45 pm. 18.7.44, at Raydon Aerodrome, respectively.

Certified True Copy

s/ E. W. Shepherd.
Detective Sergeant.

A True Copy
Alan B. Todd.
1st Lt. Inf.

Statement of Pamela Joy Dale, Age 18 years, of Victoria Cottages, Station Road, Lawford, Factory Hand. Who saith:

About 7 p.m. on Tuesday 11th July, 1944, I went to the Pictures at Lawford with two American soldiers who I know as "California" and "Kentucky". I believe their names are Walter Selby and Raymond Eves. We came out at 9.15 p.m. and went to my house.

When we arrived we found my sister Sheila had returned from Ipswich. We all stayed in until about 10.30 pm. when Sheila and I decided to ride part of the way back with Americans. We cycled as far as Touchy Hill, East Bergholt, arriving there at about 10.45 pm. We all stopped, Sheila and "Kentucy" walked about 50 yards up the road. We stood talking until I heard a clock strike eleven. I called "Winnie". She did not answer me. I started to cycle home, and told "California" to tell "Winnie" I had started. Would she hurry and catch me up.

I started to cycle home slowly, but "Winnie did not catch me up. Just before reaching the Pepper Mill, a Yank came towards me on a cycle. He did not speak to me. When I got to the Bucks Horn P. H., Brantham, I saw two Yanks with cycles. One of them said "Goodnight" to me. After seeing these two men, I saw no one else on the road before I reached home at about 11.30 p.m.

I waited until about 11.45 p.m. for "Winnie" but she did not come home. I went upstairs and told my mother that "Winnie" had not come home and then went to bed.

I had not been in bed long before I heard "Winnie" coming down the yard on her cycle. I heard her throw the cycle down and come in. When she came in I heard her crying and screaming. She said "Mum, come down quick. Pam why didn't you wait for me?" I went downstairs and saw "Winnie" in the kitchen lying on a sofa crying. I heard "Winnie" make a complaint against an American soldier who had assaulted her.

s/ D. J. Felton (Witness) (Signed) P. J. Dale
P.c. 305, Mistley.

Original statement in the pocket book of P.c. 305 Felton, Pages No. 125-129, taken at 11 am, 13.7.44. at B.X. Plasties, Brantham, Suffolk.

Certified True Copy

s E. W. Shepherd
Detective Sergeant

A True Copy,
Alan B. Todd.
1st Lt. Inf.

Statement of Mrs. Ellen May Dale, age 42 years, of Victoria Cottages, Station Road, Lawford. Married Woman. Who saith:

I am the mother of Sheila Winifred Dale, who was born on the 21st February 1924. She resides with me at Victoria Cottages, Station Road, Lawford.

About 10.30 p. m. on Tuesday 11th July, 1944, my daughters, Sheila and Pamela left my house in company with two American soldiers who I know as "Kentucky" and "California" with the intention of cycling with them to Bergholt.

About 11.30 p. m. I had just gone to bed when "Pam" came in. She said "I have been waiting for Win. I don't know where she has got to. I am too frightened to go back as it was dusk".

Just after twelve o'clock, I heard some one come in the front door and I could hear the person crying. Shelia then called out to me, "I have been attacked by a maniac and if I hadn't given way to him he would have murdered me". I got up and came downstairs and I saw my daughter sitting in a chair screaming. She was very upset. Her hair was all rough and her clothes dishevelled. She then said "A Yank has taken my knickers down and assaulted me". I said, "Do you know him?" She said, "No". I then told her to have a hot bath straight away which she did. I told her to go to the Doctor's first thing the next morning and she did so. After she had undressed to have a bath, I had a look at my daughter's clothing and saw that there was a wet stain on them.

s/ D. J. Felton (Witness) (Signed) E. M. Dale
P.c. 305, Mistley

Original statement in the pocket book of P.c. 305 Felton, Pages Nos. 122-125, taken at 3.30 pm. 12.7.44, at Victoria Cottages, Station Road, Lawford.
A True Copy

Certified True Copy

s/ E. W. Shepherd
Detective Sergeant

Alan B. Todd, 1st Lt. Inf.

Statement of Frederick Harry Elf Beckett, of High Street, Manningtree. Medical Practitioner.
Who saith:

On Wednesday 12th July, 1944, about 10 am. in consequence of a complaint made to me by Winifred Dale of Victoria Cottages, Lawford, I examined her and found bruises of the right thigh, left knee, left arm and fresh graze left knee.

She was not *virgo intacta*. From physical examination, I was unable to state that intercourse had taken place recently.

s/ D. J. Felton (Witness) (Signed) F. H. E. Beckett
P.c. 305, Mistley

Original statement in the pocket book of P.c. 305 Felton, Pages No. 111-112, taken at 10.15 am, 12.7.44 at Dr. Beckett's Surgery, High Street, Manningtree.

116 Certified True Copy

s/ E. W. Shepherd
Detective Sergeant

A True Copy
Alan B. Todd, 1st Lt. Inf.

Statement of Betty Goodall, aged 15 years 11 months, of No. 45, Peel Road, Wembley. Machine Operator.
Who saith:

On Tuesday 11th July, 1944, I was staying with my Grandmother at Marsh Cottage, Lawford, and I went to bed about 10.30 p.sm. I laid reading a book and after some time, it must have been about 11 p. m., I heard two short screams, with about a minute between them. The screams came from the roadway in front of the house and not from the back of the house. They seemed to be in the distance and not close to the house.

s/ D. J. Felton (Witness) (Signed) Betty Goodall.
P.c. 305 Mistley.

Original statement in the pocket book of P.c. 305 Felton, Pages No. 129-130, taken at 12.15 pm, 13.7.44. at Victoria Cottages, Station Road, Lawford.

Certified True Copy

s/ E. W. Shepherd
Detective Sergeant

A True Copy
Alan B. Todd, 1st Lt. Inf.

Statement of Wilfred John Felton, Police Constable, No. 305, Stationed at Mistley, Essex.
Who saith:

About 10 am. on Wednesday, 12th July, 1944, I received certain information from Doctor Beckett and: and as a result I went to his surgery at High Street, Manningtree, where I saw the witness Shelia Winifred Dale. She made a complaint to me and as a result I took possession of a pair knickers and a skirt.

About 3. pm. the same day in company with Det. Chaplin and the witness Dale I went to the Ipswich

Road, Lawford and at a spot on the greensward, 10 feet on the Suffolk side of telegraph pole A 29 and 6 feet from the road I saw where the grass had been flattened and some tall weeds broken as if some person had been lying down. The nearest house (Marsh Cottage) to this spot is 100 yards away. The surrounding country is open.

About 7.30 pm. on Monday, 17th. July, 1944, in consequence of information received I interviewed the witness Miriam Florence Cullum at her residence at 57 Colchester Road, Lawford. She made a complaint to me and I saw that the right side of her neck was swollen.

As a result of these two complaints I made enquiries and on Tuesday, 18th. July, 1944 in company with Det. Chaplin I visited the U.S.A.A.F. Aerodrome at Raydon, Suffolk. At about 3.15 pm. I was present when the accused "Smith" was interviewed by Lt. Todd and Lt. Minnella, A.P.M. On examining his left hand I saw a wound scab on the base of the thumb.

At 6.30 pm. we were shown a spot on the Ipswich Road, Lawford which the witness Miriam Florence Cullum said was the spot she had been assaulted by an American soldier. This was the same spot as where the assault on the Witness Shelia Winifred Dale had taken place.

At 7.15 pm. the same day I was present at the Raydon Aerodrome when the accused "Smith" was placed on an identification parade with fifteen other men. I saw the witnesses Cullum and Dale pick "Smith" out as the man who had assaulted them on Tuesday, 11th. July, 1944.

s/ D. J. Felton P.c. 305 Mistley

Certified True Copy

s/ E. W. Shepherd
Detective Sergeant

A True Copy
Alan B. Todd, 1st. Lt. Inf.

Exhibit "C"

117 Shelia Winifred Dale, Victoria Cottages, Station Road, Lawford, Essex, being duly sworn, testified on 23 July 1944, upon examination and cross-examination before the accused in substantiation of the facts as set forth

in her statement shown in Exhibit B and in addition as follows:

That it was about 2305 hours when her sister, Pamela Joy Dale, shouted out to her that she was going home.

That when she got home after the incident on 11 July 1944, her sister Pamela went to a friend's house and brought an American soldier down to see if he could be of any assistance, and she told him what had happened.

That she knows Miriam Florence Cullum but has never been out with her.

That she was in the Bucks Horns Public House about a year and a half ago but has not been in there since that time.

That she had never seen accused before the night of 11 July 1944, and that she is positive he is the soldier who attacked her.

MIRIAM FLORENCE CULLUM, 57 Colchester Road, Lawford, Essex, being duly sworn, testified on 23 July 1944, upon examination and cross-examination before the accused in substantiation of the facts as set forth in her statement shown in Exhibit B, and in addition as follows:

That she does not go to the Public Houses but that she did go to the Bucks Horns Public House with her boy friend's mother once about a year ago. That she has not been there since.

That she has never been out with American soldiers but holds no dislike for them.

Shelia

That she knows Winifred Dale but has never been out with her.

That when she complained of the assault mentioned in her statement taken on 17 July 1944, to her mother, she was urged by her mother not to report it as she (her mother) felt the soldier had just been drunk and there was no need to get him in trouble. That later on that week a man who lives near her and who works at the same place Shelia Winifred Dale works told her that Miss Dale had been attacked on the night of 11 July 1944. That her father then urged her to report it to the Police, which she did.

That when the soldier who assaulted her had hold of her throat and looked over her shoulder, her back

was to the bridge in the direction from which the soldier and civilian came. That they were riding bicycles and told her the soldier who passed them as they approached her said goodnight to them, and hence they didn't think at the time that he was the one who was causing the commotion.

That when she gave the description in her statement of the soldier assaulting her she was not previously told of any description of any soldier in any other like incident. That she was not prompted in making her description in any way and was not asked to compare her description of the soldier assaulting her with any other soldier.

That she had never seen the accused before the night of 11 July 1944, and that she is sure he is the soldier who assaulted her.

118 .....

(Leave the Space Above This Line for Indexing).

SMITH, BERNARD W., Pvt
(Name of Accused)

1st Ind.

HQ, AAF STATION F-157, APO 637, U. S. Army, 20 July 1944.

TO: 1st Lt ALLAN B. TODD, 01287269, INF, Det A 1260th MP Co (Avn).

You are hereby designated to investigate, in accordance with the provisions of the 70th Article of War, paragraph 35a, M. C. M., and the supplemental noted for Investigating Officers, locally supplied, the charges herewith dated 19 July 1944, against the accused named above.

By order of Lieutenant Colonel RIMERMAN:

R. A. JOHNSON,
Captain, Air Corps,
Adjutant.

Incls: No change.

2nd Ind.

ALAN B. TODD, 1st Lt. Inf., AAF Station F-157. 24 July 1944.

TO: Commanding Officer, AAF Station F-157, APO 637, U. S. Army.

1. Accomplished.

2. Report of investigation is enclosed herewith as inclosure #1.

3. Delay in submitting this report was caused by difficulty in obtaining statements of civilian witnesses taken by British Civil Police which were necessary to check testimony taken during the investigation.

ALAN B. TODD,
1st Lt. Inf.

4 Incls—
Incl 1—Charge Sheet
Incl 2—Evidence of Previous Convictions
Incl 3—Time Data Sheet
Incl 4—Report of Investigating Officer

119

Note: It is important to observe directions in the footnotes.

(LEAVE THE SPACE ABOVE THIS LINE FOR BINDING)

HQ, Det. 353rd Fighter Group, APO 637
19 July, 1944

Subject: Court-Martial Charges against Bernard W. Smith
To: Commanding Officer[1] AAF Station F-157, APO 637, U. S. Army.

1. In compliance with paragraph 32, M.C.M., there are forwarded herewith court-martial charges which it appears probable will not be disposed of either under A.W. 104 or by reference to a summary court-martial, signed by me as accuser against the person subject to military law named above.

2. Summaries of expected testimony upon which the charges are based are attached.[2]

3. Documentary evidence upon which the charges are based is attached, as follows: None.

4. There is attached evidence of 1 previous convictions of accused, taken from his Service Record or other sources,

[1] This letter will be addressed to the company or other immediate commander of the accused (if this officer is not himself the accuser), and signed by the accuser immediately following paragraph 3. The company or other immediate commander will enter his "Forwarding Indorsement" (not numbered) to the regimental commander or other officer exercising court-martial jurisdiction, immediately following the signature of the accuser, so as to include the concluding paragraphs of the form.

In case the company or other immediate commander is also the accuser, the letter will be addressed directly to the regimental commander, or other officer exercising court-martial jurisdiction.

[2] Summaries of expected testimony may be brief and informal.

which may be considered by the court in case of a conviction upon the present charges.

5. Character of accused's service prior to offenses here charged:[1] Fair.

6. In my opinion he should[3] be eliminated from the service.

7. I recommend trial by General court-martial.

ERNEST P. MACGREGOR,
Captain, Air Corps.
Immediate Commander of Accused.

Incls.:
Charge Sheet.
Summaries of Expected Testimony
Documents listed in pars. 3 and 4

Hq SOS USAPP 11-43 25M 17775

C.M.—Form 1—Letter of Transmittal.

120 (To be retained as part of file)

~~CONFIDENTIAL~~
Classification
~~changed~~ cancelled
Date JAN 14 1947
By—Ellwood W. Sargent
E. W. S.

CM ETO 3837 Name Pvt BERNARD W. SMITH (32286877)

ORG. Hq. Det., 353rd Fighter Group.

TRIED 25-26 Aug, 1944, at Hq, VIII Fighter Command, AAP Station F-157, Eng. At time of commission of offense accused was 33 years 4 mos. of age, having completed 6 yrs. 2 mos. service.

OFFENSES OF WHICH CONVICTED

CHARGE I: Viol. of the 92nd AW.
Spec: Rape.

CHARGE II: Viol. of the 93rd AW.
Spec: With intent to commit rape, dragged victim from highway into a field, hitting her with fist

[1] Use the form provided if there are any previous convictions to be considered; if not, enter "no" in the blank space. This entry will be accepted as the company commander's certificate that there is no evidence of previous convictions to submit.

[2] Enter "Excellent," "very good," "good," "fair," "poor," or "unknown," and such other comment as may appear appropriate.

[3] Enter "should" or "should not." Add statement of reasons, *e.g.* "because of moral turpitude involved," or other appropriate comment in explanation of opinion and recommendation.

on head, taking hold of her throat with his hands and kicking her in the back with his foot.

MAXIMUM AUTHORIZED SENTENCE. DEATH
SENTENCE IMPOSED LIFE.
REDUCED BY R. A. No. TO DD, TF, CHL .... YRS. .... MOS.
PREVIOUS CONVICTIONS 1-Spec. CM—AWOL for 5 days in viol. of the 61st AW.
FIELD REVIEW ADOPTED? No as to summary of evidence only.
RECORD LEGALLY SUFFICIENT AS TO FINDINGS? YES. SENTENCE? YES.
CLEMENCY RECOMMENDED? No.
REMARKS:

Classification
~~changed~~ cancelled
Date JAN 14 1947
By—Ellwood W. Sargent
E. W. S.

~~CONFIDENTIAL~~

.....
Chairman for Board of Review.

121
8FC Form #429 HEADQUARTERS
VIII FIGHTER COMMAND
Office of the Staff Judge Advocate
APO 637 AAF Station F-341

MEMORANDUM to accompany the record of trial in the case of:

Smith, Bernard W. (Name) Private (Rank) 32286877 (Serial No.)
Headquarters Detachment, 353rd Fighter Group
(Immediate and next higher organization)
who was tried at AAF Station F-157
on charges alleging violation of: A.W. 92 and 93.

Chronology	*Date*	*No. of Days*	*Explanation*
1. Offense Committed	11 July 1944		
2. Accused confined:			
By civil authorities			
By military authority			
By military authority ordering trial	18 July		* Accused not suspected until this date.
Reconfined from escape			

3. Charges preferred	19 July	1	
4. Charges investigated	24 July	5	Great number of civilian witnesses
5. Charges forwarded by C.O.	24 July	0	
6. Charges received J.A.	27 July	3	
7. Charges—action Staff J.A.	7 August	11	Accused hospitalized for psychiatric examination for 4 days. Selection of new court and defense counsel.
8. Charges referred for trial	9 August	2	
9. Trial had:	25-26 August	16	
Total to trial		38	
Less time in hospital		4	See attached letter from Special defense Counsel who was located at different station from accused.
Less delay at request of defense		10	
NET TOTAL		24	Voluminous record. Necessary to send it to three stations for authentication.
10. Record of trial received.	11 September	16	
11. Review by Staff J.A.:	19 September	8	
12. Action by Commanding General:	20 September	1	
TOTAL TO ACTION C.G.		49	Withheld pending action under A.W. 50
13. Mimeo. orders received:			
14. Record of trial mailed to J.A.G.O.	22 September	2	
		51	

TOTAL

Action	Trial
13 July	13 July
31 Aug.	26 Aug
20 Sept	
64	39
—14 delay	—14 delay
50	25

Date 28 September, 1944.

Remarks:

RICHARD J. KENT
Captain, J.A.G.D.
Asst. Staff Judge Advocate.

All delays must be fully explained.
Disregard first day; count day action taken.

122

~~CONFIDENTIAL~~
Classification
~~changed~~ cancelled
Dated Jan 14 194
By Ellwood W. Sargent
E. W. S.

IN 16 P. M.
26 Sep 1944
BJAGO-ETO

RECORD OF TRIAL
of,

SMITH, BERNARD W. 32286877
(Last name) (First name and middle initial) (Army-Serial No.)

Private Hq. Det. 353rd Fighter Group
(Rank) (Organization)

AAF Station F-157
(Station)

by

GENERAL COURT-MARTIAL
appointed by the Commanding General of the
VIII FIGHTER COMMAND
Tried at
AAF STATION F-157
25 August-26 August, 1944

CERTIFIED AND PASSED:
Chief of Division .....
Examiners Section .....
Statistical Section E. B. H.

Received
27 Sep 1944 9-0 A. M.
Board of Review
OJAG-ETOUSA
CS

~~CONFIDENTIAL~~
Classification
~~changed~~ cancelled
Date Jan 14 1947
By Ellwood W. Sargent
E. W. S.

Classification changed to RESTRICTED
Auth: TJAG Guy W. Rogers, Jr.
Capt. J460

Date: 31 Jan 46

SEC 47890
2574-C

C.M. Form 10—Record of Trial, G.C.M.—Cover (Front)

123 INSTRUCTIONS

1. This cover and other printed forms (C.M. Forms 10 to 18) for record of trial by general court-martial will be used in preparing such records in cases to which they are reasonably adapted without extensive alterations. In any case in which the form does not provide adequate space to record the actual proceedings, in accordance with Appendix 6, M.C.M., the printed skeleton sheets which are so deficient will not be used, and that part of the record will be typed, using the form sheets as models to the extent applicable.

2. The printed forms have been so devised that deletions of the printed text will rarely be required. When necessary to delete, line out with pen and ruler. When several consecutive lines are to be deleted a single line from upper left to lower right will suffice. Do not make trivial changes which have no significance. Be sure, however, to delete any part of the printed wording which does not speak the truth (as applied to the particular record) or which you do not intend to use for any reason.

3. The record of trial by general court-martial, and accompanying papers, will be bound by the trial judge advocate in the following order:

a. This Cover Sheet.
b. The trial judge advocate's indorsement transmitting the record.
c. General Court-Martial Data Sheet (A.G.O. Form No. 116).
d. The Charge Sheet.

e. Papers accompanying the charge sheet when referred for trial (less duplicate copies delivered to accused) in the following order:
   (1) Accuser's letter of transmittal of charges.
   (2) Reference for investigation.
   (3) Investigating Officer's Report.
   (4) Summaries of Evidence submitted by Investigating Officer.
   (5) Forwarding Indorsements.
   (6) Other papers accompanying the charges (if any).
   (7) Advice of Staff Judge Advocate.

f. A copy of the reporter's voucher or a statement that the reporter is a civilian employee not entitled to extra compensation. See par. 21, AR-35-4120, April 16, 1936).

g. Carbon copy of the record (if not desired by the accused).

h. Record of former hearings (if any).

i. The second Cover Sheet, marked (Record Proper).

j. The Record of Trial proper, in the following order:
   (1) Index sheet, with receipt of accused for copy of the record (if a copy is delivered to him).
   (2) Record proper of the proceedings in court (pages numbered at bottom).

   Page 1 of the record is the mimeographed sheet furnished to the trial judge advocate beginning with the words "Proceedings of a general court-martial convened at ..... pursuant to the following orders:", followed by the complete text of the order appointing the court. Amending orders, if any, follow as pages 2, 3, etc., and after the last of them follows printed C. M. Form 12, showing those present and absent, appropriately numbered at the bottom.

   (3) Exhibits (marked at bottom A, B, C, etc., in the order introduced).

   Attach each exhibit to a separate sheet of legal cap size, if the exhibit is not itself of that size.

   (4) Other papers ordered appended by the court (if any).
   (5) Clemency papers.

k. The back Cover Sheet.

Hq 8 OS USAPE/7-43/5M/12280

124 GENERAL COURT-MARTIAL DATA SHEET

OF

Smith, Bernard W. 32286877, Private,
(Last name) (First name) (Middle initial) (Army serial No.) (Grade)

Hq. Det. 353rd Fighter Group
(Company, regiment, or arm or service)

J. A. G. O., C. M. No. 279112

		Trial J. A.		Staff J. A.		J. A. G. O.	
		Yes	No	Yes	No	Yes	No
1.	Was court ordered by proper authority?	V		V		V	
2.	Are all orders showing membership of court properly entered in record?	V		V		V	V
3.	Were there less than five members detailed or present at any meeting?		V		V		V
4.	Was the law member of the court designated by convening order?	V		V		V	
5.	If the presence of the law member was specifically required by the convening authority, was he present at each session?	—	—	—	—	—	—
6.	Did the court have jurisdiction of person and offense?	V		V		V	
7.	Does the record show place, date, and hour court convened?	V		V		V	
8.	Are all members of the court, trial judge advocate, assistant trial judge advocate, defense counsel, and assistant defense counsel accounted for as present or absent?	V		V		V	
9.	Was accused asked whom he desired as counsel?	V		V		V	
10.	Was reporter sworn?	V		V		V	
11.	Was interpreter sworn?	—	—	—	—	—	—
12.	Was accused extended right of challenge as to each member of the court, and was he instructed as to his right to exercise one peremptory challenge against any member except the law member?	V		V		V	
(13.)	Was action of court upon challenges regular and properly taken?	—	—	V		V	
14.	Was the court sworn?	V		V		V	
15.	Was any officer sitting as a member of the court the accuser, a witness for the prosecution, or, upon a rehearing, one who sat as a member on the former trial?		V		V		V
16.	Was the personnel for the prosecution sworn?	V		V		V	
(17.)	Was the accused properly arraigned?	—	—	V		V	
18.	If pleas of guilty were explained was accused's response, if any, recorded?	—	—	—	—	—	—
(19.)	Does each specification state an offense under the Articles of War?	—	—	V		V	
20.	Are there copied into the record—						
	(*a*) Charges and specifications?	V		V		V	
	(*b*) Name, grade, and organization of the person signing charges?	V		V		V	

		Trial J. A. Yes	Trial J. A. No	Staff J. A. Yes	Staff J. A. No	J.
	(c) Affidavit to the charges and specifications?	V		V		
	(d) Name of the person who administered the oath verifying the charges, and his official capacity?	V		V		
	(e) The order of reference for trial?	V		V		
(21.)	If the accused was advised of his right to plead the statute of limitations, was his response, if any, recorded?	—		—		
22.	Are pleas of accused regularly entered?	V		V		
23.	Were the witnesses sworn?	V		V		
24.	Are the findings properly entered?	V		V		
25.	Was the vote upon each finding by secret written ballot?	V		V		
26.	Was sentence reached by secret written ballot?	V		V		
27.	Did at least two-thirds of members present at the time the vote on each finding was taken concur therein?	V		V		
125						
28.	In each case of finding of guilty where death sentence was mandatory, did all members present concur in each finding?	—		All members concurred in all will resent directive		S V
29.	Did members present concur in sentence, as follows: To death, all members; to life imprisonment or confinement for over ten years, at least three-fourths of members; to any other punishment, at least two-thirds?	V		V		
(30.)	Does the evidence sustain the findings of the court?	—		V		
31.	Are the findings legal?	V		V		
32.	Is the sentence legal?	V		V		
(33.)	Does any ruling of the court on the admission of evidence or other matters injuriously affect the substantial rights of accused?	—		—	V	
34.	Did all members who participated in proceedings in revision vote on original findings and sentence?	—	—	—	—	—
35.	At proceedings in revision are the trial judge advocate, assistant trial judge advocate, defense counsel, assistant defense counsel, the accused, and the individual counsel, if any, accounted for as present or absent?	—	—	—	—	—
36.	Is the record properly authenticated?	V		V		
(37.)	Is action of reviewing authority properly entered in record and signed?	—	—	V		
38.	In case of adjournment or continuance, are each day's proceedings properly signed by trial judge advocate?	V		V		
39.	After each adjournment during trial, is presence or absence of members of court, trial judge advocate, assistant trial judge advocate, defense counsel, assistant defense counsel, accused, his individual counsel, and the reporter properly accounted for?	V		V		

	Trial J. A. Yes	Trial J. A. No	Staff J. A. Yes	Staff J. A. No	J. A. G. O. Yes	J. A. G. O. No
(40.) Is the action of the reviewing authority legal and properly taken?						
41. Is clemency recommended?						

HARLEY J. MCNEAL 12 Sept. 1944
Trial Judge Advocate. (Date)
Cap't JAGD

RICHARD J. KENT, Capt., JAGD 20 Sept. 1944
Ass't. Staff Judge Advocate. (Date)

B. FRANKLIN RITER Legally Sufficient 9 Dec. 1944
Officer Reviewing Record. (Action) (Date)
Colonel JAGD

B. FRANKLIN RITER Legally Sufficient 9 Dec. 1944
Chief Examiner. (Action) (Date)

B. FRANKLIN RITER
Colonel JAGD
Chairman, Board of Review

NOTE.—Questions 13, 17, 18, 19, 21, 30, 33, 37, and 40 not to be answered by the trial judge advocate. Question 40 not to be answered by the staff judge advocate.

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RECORD OF TRIAL BY GENERAL COURT-MARTIAL of Smith, Bernard W., 32286877, Pvt, Hq. Det. 353rd Fighter Group

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EXHIBITS

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The carbon copy of the record of trial (less the exhibits) furnished to the accused, per his receipt below.

HJMcN.
(Initials, TJA)

RECEIPT FOR COPY OF RECORD

I hereby acknowledge receipt of a carbon copy of the above described record of trial, delivered to me at AAF Station F-157 this 8 day of September 1944.

BERNARD W. SMITH
BERNARD W. SMITH
(Signature of the accused)

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RESTRICTED

PROCEEDINGS OF A GENERAL COURT-MARTIAL WHICH CONVENED AT HEADQUARTERS VIII FIGHTER COMMAND PURSUANT TO THE FOLLOWING ORDER.
SPECIAL ORDERS NUMBER 195 APO 637 AAF STATION F-341
9 August 1944

EXTRACT

1. A General Court-Martial is appointed to meet at or in the immediate vicinity of AAF Sta F-157, or at such other places as may be designated by the President thereof, at

1000 hours, 10 August 1944, or as soon thereafter as practicable, for the trial of the case of United States vs Pvt Bernard W. Smith, Hq., 353rd Ftr. Gp., only.

DETAIL FOR THE COURT

Col. Donald P. Graul, 017557, Sig C
Lt Col Wesley W. Harting, 0485609, CE
Maj Hugh B. Speir, 0485137, AC
Maj Ceylon B. Frazer, 0512575, GSC, Law Member
Maj Aaron J. Yauger, 0177735, AC
Maj Charles T. Bruett, 0905620, AC
Maj Noble H. Hodge, 0430731, AC
Capt James C. Cope, 0419592, MC
Capt John B. Rose, Jr., 024960, AC
Capt William S. Woolsey, 0855845, AC
Capt Harley J. McNeal, 0914222, JAGD, Trial Judge Advocate
1st Lt Alan B. Todd, 01287269, Inf, Asst Trial Judge Advocate
Capt William Kapelman, 0565805, AC, Defense Counsel
1st Lt Frederick M. Crollard, Jr., 0562787, AC, Asst. Defense Counsel

By command of Brigadier General GRISWOLD:

BENJAMIN J. WEBSTER,
Colonel, AC,
Acting Chief of Staff.

OFFICIAL:
JOHN J. SAILORS,
Colonel, AGD,
Adjutant General.

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RESTRICTED

Note to Reporter: Read carefully all footnotes and Instructions on back of Cover Sheet.

If extensive alterations of the printed form are required to make mark the truth, use a plain sheet of paper and type what actually occurred, using the form as a model to the extent it is applicable.

(LEAVE THIS SPACE ABOVE THIS LINE FOR BINDING)

HQ., VIII FIGHTER COMMAND
AAF STATION F-157,
25 August, 1944

The court met pursuant to the foregoing orders at 10:00 o'clock, A. M.,

PRESENT

Col Donald P. Graul, 017557, Sig C,
Lt Col Wesley W. Harting, 0485609, CE
Maj Hugh B. Speir, 0485137, AC
Maj Ceylon B. Frazer, 0512575, GSC, Law Member
Maj Charles T. Bruett, 0905620, AC
Maj Noble H. Hodge, 0430731, AC
Capt James C. Cope, 0419592, MC
Capt John B. Rose, Jr., 024960, AC
Capt William S. Woolsey, 0855845, AC
Capt Harley J. McNeal, 0914222, JAGD, Trial Judge Advocate
1st Lt Alan B. Todd, ~~01287269, Inf~~, Asst Trial Judge Advocate
Capt William Kapelman, 0565805 AC, Defense Counsel
1st Lt. Frederick M. Crollard, Jr. 0562787, AC, Asst Defense Counsel

ABSENT

Maj Aaron J. Yauger, 0177735, AC—Transferred from station, (per paragraph 4, SO 198, Hq, VIII Fighter Command, dated 12 August 1944.)

Note: Be sure that all the personnel of the court, including the trial judge advocate and defense counsel and their assistants, are accounted for as either present or absent.

After the name of each absentee state the reason for his absence, or enter the remark "reason unknown."

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Note to Reporter: Read carefully all footnotes, and Instructions on back of Cover Sheet.

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(LEAVE THE SPACE ABOVE THIS LINE FOR BINDING)

The Court proceeded to the trial of

(Last name)	(First name and middle initial)	(Army Serial No.)	(Rank)	(Organization)
Smith	Bernard W.	32286877	Pvt, Hq. Det.	353rd Ftr. Grp.

who appeared before the court and was given the opportunity to introduce civil or military counsel of his own selection.

INTRODUCTION OF COUNSEL (By the accused)

Associate ~~Individual~~ Counsel introduced: 2nd Lt. Harry Lieberman, O-1551668.

Defense Counsel of the Court: services desired.

Assistant Defense Counsel: services desired.

REPORTER SWORN

Verna E. Newman, Cpl, WAC, A-217665 was sworn as reporter.

The accused was then asked if he wanted a copy of the record of trial, to which he replied that he did.

The trial judge advocate then announced the names of the members of the court present and absent and the names of the accuser,[4] the investigating officer,[5] officers who forwarded the charges[6] and members of the court who would be called as witnesses for the prosecution.[7]

T. J. A. No member of the court will be called as a witness for the Prosecution.

Prosecution: ~~If any member of the court is aware of any facts which he believes to be a ground of challenge by either side against any member it is requested that he state such facts.~~

~~Challenges by the Prosecution~~:

~~Prosecution (to accused): You now have the right to challenge any member or members of the court for cause, and any one member, other than the law member, peremptorily.~~

~~Challenges by the Defense~~:

131 LAW MEMBER. Private Smith, you understand, you are charged with a serious offense, involving a possible death penalty. Have you had ample time to confer with Counsel
(HJM) your Defense and with Lt. Lieberman?

ACCUSED. Yes, sir.

LAW MEMBER. You are satisfied to proceed with the trial at this time?

[4] Enter after the colon "None," or names of individual counsel introduced.

[5] Enter in the blank "are" or "not" as indicated by the accused. In a proper case add "as associate counsel," "excused and withdrew," "absent," or other appropriate remark.

[6] Complete by adding either a period or the word "not."

[7] If a member of the court, the record should show further, as to each, whether he was excused and withdrew.

[8] Enter after the colon "None," or, in accordance with the facts, "The (prosecution) (defense) challenges (for cause) (peremptorily) * * * (Captain * * *)." Use additional sheets, as necessary, to record full proceedings on challenges, showing in each case whether the challenged member was excused and withdrew.

ACCUSED. Yes, sir.

LAW MEMBER. You are satisfied you have had sufficient time to confer with your counsel to sufficiently try your case?

ACCUSED. Yes, sir.

T. J. A. I will now comply with Military Justice Circular #1, dated 1 January 1944, issued by the Branch Office of The Judge Advocate General with the European Theater of Operations. It is my duty to test the court to ascertain whether any members of the court have any scruples against sentencing the accused to death if he is found guilty and to challenge for cause any members of the court who have such scruples. I will now read to the court the appropriate paragraphs as recommended by the Assistant Judge Advocate General, European Theater of Operations:

"If any member of the court has scruples which would prevent him from voting for a sentence to death on the conviction of accused of the capital offense or offenses mentioned, regardless of the evidence of the aggravated nature of the crime, he is enjoined to so state at this time.

The foregoing is not meant to suggest to a court what punishment it should adjudge in any case or for any type of offense. That is their duty, to be performed under oath 'to well and truly try and determine, according to the evidence', (HJM) and to 'duly administer justice, without partiality, favor or affection, according to the provisions of the rules and articles for the government of the armies of the United States * * *."

I will now ask the court whether any member has scruples which would prevent him from voting for a sentence of death as I have stated heretofore?

PRESIDENT OF COURT. There appear to be none.

PROSECUTION. If any member of the court is aware of any facts which he believes to be a ground of challenge by either side against any member it is requested that he state such facts.

President of COURT. There appear to be none.

CHALLENGES BY THE PROSECUTION:

T. J. A.: Prosecution has no challenges for cause or peremptorily.

HJMcN DPG PROSECUTION. (to accused). You now have the right to h

challenge any member or members of the court for cause, and any one member, other the law member, peremptorily.

132 CHALLENGES BY THE DEFENSE:

DEFENSE. Defense desires to challenge Major Speir for cause, by reason of the fact he sat on another case involving the accused. Is that a fact, sir?

Major SPEIR. I am not at all sure.

Law MEMBER. That would not be an automatic disqualification unless the sitting on the case had caused him to form some opinion about the charge here, or about the accused.

DEFENSE. It would reveal a holding by a previous court, or a possible conviction for a crime I am not permitted to state now. As one of the members, he would know whether or not he was so convicted.

Law MEMBER. Every court martial sentence is published, publicly I assume and he probably would not know by reason of sitting on the court facts that might not be known to other members of the court. I think, however, the court will have no objection to Major Speir being excused providing both the Prosecution and Defense agree to it.

T. J. A.: I think, in fairness to Major Speir, if he has not formed an opinion as to Pvt. Smith's guilt or innocence in the case, he should be allowed to sit. If the Defense desired to inquire of Major Speir, I think that is his right, or if Major Speir desires to make a statement as to whether or not he might be prejudiced.

DEFENSE. It was just our feeling in the matter that Major Speir had sat previously and we desired to challenge him for cause.

Law MEMBER. (to accused). Do you desire to cross-examine Major Speir as to any opinion he may have formed?

ACCUSED. No, sir.

In view of the fact that Defense Counsel had no definite reason for challenging Major Speir for cause, the President of the Court polled the court in the absence of Major Speir and announced that the challenge for cause as to Major Speir was not sustained. Major Speir thereupon resumed his seat.

DEFENSE. Accused desires to challenge Major Speir peremptorily.

Major Speir was then excused and withdrew from the room.

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LEAVE THE SPACE ABOVE THIS LINE FOR BINDING

The accused was asked if he objected to any member of the court remaining present, to which he replied in the negative.

COURT AND PROSECUTION SWORN

The members of the court and the personnel of the prosecution were then sworn.

ARRAIGNMENT

The accused was then arraigned upon the following charges and specifications:

CHARGE I: Violation of the 92nd Article of War.

Specification: In that Private Bernard W. Smith, Headquarters Detachment 353rd Fighter Group, did at Ipswich-Manning Tree Road, Lawford, Essex, England, on or about 11 July 1944 forcibly and feloniously, against her will, have carnal knowledge of Sheila Winifred Dale age 20, Victoria Cottages Station Road, Lawford, Essex.

CHARGE II: Violation of the 93rd Article of War.

Specification: In that Private Bernard W. Smith, Headquarters Detachment 353rd Fighter Group, did, at Ipswich-Manning Tree Road, Lawford, Essex, England, on or about 11 July, 1944, with intent to commit a felony, viz, rape, commit an assault upon Miriam Florence Cullum, 57 Colchester Road, Lawford, Essex, England, by willfully and feloniously dragging her from the highway into a field, hitting her with his fist on the head, taking hold of her throat with his hands and kicking her in the back with his foot.

(Signature of accuser)[1] ERNEST P. MACGREGOR.
(Name typed)[1] ERNEST P. MACGREGOR.
Captain, AC.
Hq. Det. 353rd Fighter Group.
(Grade, organization, or branch)

[1] Both the signature and the name typed thereunder are copied (typed) into the record, as they appear on the Charge Sheet. This applies likewise to signatures on the following page.

Hq. S OS 2-43 10M 6308

Note to Reporter — Read carefully all footnotes and instructions on back of Cover Sheet.

If extensive alterations of the printed form required to indicate the truth, use a plain sheet of paper and type what actually occurred, using the form as a model to the extent that it is applicable.

(LEAVE THE SPACE ABOVE THIS LINE FOR BINDING)

AFFIDAVIT

Before me, the undersigned, authorized by law to administer oaths in cases of this character, personally appeared the above-named accuser this 19th day of July, 1944, and made oath that he is a person subject to military law and that he personally signed the foregoing charges and specifications, and further that he * * * has investigated the matters set forth in the specification of Charge I and Charge I and specification of Charge II and Charge II and that the same are true in fact, to the best of his knowledge and belief.

(Signature) RALPH JOHNSON.
(Name typed) .....
(Grade and organization) *Capt AC.*
(Character in which oath was administered) *Adjutant* AAF Station F-157.

1ST IND.

Headquarters VIII FIGHTER COMMAND, AAF STATION F-341, APO 637 9 August, 1944

Referred for trial to Capt. Harley J. McNeal, trial judge advocate of the general court-martial appointed by paragraph 4, Special Orders No. 195, Hq, VIII Fighter Command, 9 August, 1944.

By Command of BRIGADIER GENERAL GRISWOLD:
(Signature) W. T. DURKOP.
(Name typed) W. T. DURKOP.
(Grade and organization) *Major AGD.*
Asst Adj Gen

SPECIAL PLEAS AND MOTIONS[1]: None

PLEAS TO THE GENERAL ISSUE[2]:

To the Specification, Charge I —Not Guilty
To Charge I —Not Guilty
To the Specification, Charge II—Not Guilty
To Charge II —Not Guilty

READINGS FROM LEGAL AUTHORITIES[3]:

The Court desired the following readings from the Manual of Courts-Martial and the T. J. A. read them. Page 165, paragraph b. "Rape"; also Page 179 "Assault with intent to commit rape."

The trial judge advocate made an opening statement to the court.

DEFENSE: At this time I should like the Law member to caution the court that all that was said by the Counsel for the Government is merely what he intends to prove and is not to be taken as any evidence in the matter
135 whatever. I believe the T. J. A. over-exerted himself in that matters in which there is any question as to the admissibility of evidence is not to be discussed by him in the opening remarks, but I did not desire to interrupt his statement.

Law MEMBER. The court will recognize, of course, that the statement made by the Trial Judge Advocate is merely his

---

[1] If "None," so state. If any special pleas or motions are made, the record will show the proceedings and action thereon. The printed matter following (PLEAS TO THE GENERAL ISSUE, etc.) will in that case be stricken out and typed into the record after such proceedings.

[2] If the accused pleads not guilty throughout, enter "Not Guilty to all specifications and charges." Otherwise the plea made to each specification and charge must be stated separately; and the record will continue (in accord with the facts): "(The President) (The law member) (The defense counsel stated that he had) explained to the accused the meaning and effect of (the) (each) plea of guilty." Do not record the words of such explanation (if made in court), but indicate fully any response made by the accused, either in his own words, or (*e.g.*, if his response is "yes" or "no" to questions asked) in substance; for example: "The accused stated that he understood and that he wished his plea of guilty to stand."

[3] If "None," so state. Otherwise give the citation of each reading, indicating the pages or paragraphs read, and whether it was offered by the prosecution or defense, or ordered by the court. Do not copy the text of the readings into the record.

Enter "an" or "no." Do not record the opening statement (if any) unless directed to do so by the court, or unless necessary to understand proceedings which follow. In case of an objection or question concerning the opening statement, the proceedings and action thereon will be recorded.

statement of what he intends to prove and is not evidence in any sense and has no probative value whatever.

DEFENSE. Very well.

DALE, SHEILA WINIFRED, Victoria Cottages, Manning Tree, Essex, a civilian, a witness for the Prosecution, was sworn and testified as follows.

Direct Examination.

Questions by PROSECUTION.

Q. What is your name?
A. Sheila Winifred Dale.
Q. Where do you live?
A. Victoria Cottages, Manning Tree, Essex.
Q. That, of course, is here in England?
A. Yes.
Q. How old are you?
A. 20.
Q. Are you working at the present time?
A. Not at the moment, no.
Q. Where did you work?
A. Brantham BX Plastics.
Q. How much do you weigh?
DEFENSE. Objected to as incompetent.
LAW MEMBER. Objection overruled.
WITNESS. 8 stone.
PROSECUTION. How many pounds in a stone?
A. 14.
Q. Calling your attention to the date of 11 July 1944, at about 10:30 P. M. that night, where were you?
136 A. We were just about leaving home.
Q. When you say "we" whom do you mean?
A. My sister and two friends of ours.
Q. Where were you going?
A. Going to ride back to Bergholt.
Q. Did you, in fact, ride along the roadway?
A. Yes.
Q. Did there come a time when you stopped cycling along—
DEFENSE. I must object. I must ask the Prosecution not to lead this witness.
LAW MEMBER. Objection is sustained.
PROSECUTION. Where did you go, Miss Dale?
A. I went as far as Bergholt.
Q. What did you do there?
A. I stopped for about 10 minutes.

Q. Then what happened?

A. My sister called to me and said she was going home and my friend—we walked back to where she was—it was about 50 to 75 yards away—she wasn't there. We thought probably she was waiting at the bottom of the hill. The friend with me wanted to ride to the corner but I said I would be all right and I would soon catch up. So I went on alone.

Q. Where did you go?

A. I rode down to the bottom of the hill, toward Manning Tree and when I got to the bottom of the hill I saw it was getting dark and realized it was lighting up time and as I didn't have any lights on my bicycle I started to walk.

Q. Approximately what time was it then?

A. It must have been just after 11.

Q. As you were walking along, did anything happen there?

A. I was walking along for about 400 yards just by the mill at the bottom of the hill, between those houses and the Bucks Horns and saw a light coming toward me.

Q. What next happened?

A. When it got close to me, I saw it was an American soldier. He shouted out: "Hello, there".

137 DEFENSE. I ask that the Prosecution fix the time.

PROSECUTION. At approximately what time was this?

A. It must have been about 5 or 10 minutes past 11.

Q. What did you say the American said?

A. He said: "Hello, there".

Q. What, if anything, did you say?

A. I didn't answer.

Q. What next happened?

A. I saw he was turning his cycle around, so I got on my bicycle and rode fast.

Q. Then what happened?

A. Soon he caught up with me and rode in front of my wheel and I had to get off.

Q. Where was this?

A. On the left side of the road before you get to the Bucks Horns.

Q. Where is the Bucks Horns located?

A. In Brantham.

Q. You were going where at this time?

A. Going home to Manning Tree.

Q. Approximately how far is Manning Tree from Brantham?

A. One mile.

Q. When the American rode in front of your cycle what happened?

A. I had to get off. He put his hand on my handle bar and wanted me to stop. I let him see I didn't want to have anything to do with him. I got around the side of my bike and got on my bike again. Two Americans came along and he shouted something to them but I don't know what it was.

Q. Approximately what time was that?

A. 20 minutes past 11.

Q. What happened to the two Americans?

A. They just rode by.

Q. What did you then do?

A. I continued to cycle.

Q. Where was this American?

138 A. He was cycling along beside me.

Q. As you cycled along, did anything happen after that?

A. He was talking to me; I didn't answer. He wanted to see me home and I told him I didn't want him to.

Q. How far along the roadway did you get before anything unusual happened?

A. I don't understand you?

Q. Did anything happen between you and the American after you said you didn't want him to go home with you?

A. Not until we came to the short cut road from Bratham to Manning Tree. He suggested we go there.

Q. Describe this short cut for the court.

A. It is only a short pathway leading along by the river. It is shorter than by the road and very lonely.

Q. Is there anything near this short cut that you can identify or fix for the members of the court? Any object there?

A. There are some white bridges. It is right close to the bridges.

Q. How many bridges were there from Brantham to Manning Tree on the road you were traveling along?

A. Two.

Q. Near which bridge is this pathway or short cut, as you are going toward Manning Tree?

A. The second one.

Q. He asked you to go down this short cut?

A. Yes.

Q. What did you reply?

A. I told him I didn't live nowhere near that.

Q. What did you do then?
A. I started cycling, or rather continued cycling.
Q. How far along did you cycle?
A. About 100 yards.
Q. Then what, if anything, happened?
A. He got hold of my handle bars and shook it. He said: "You have got to stop here whether you like it or not".
Q. What happened to you?
A. I fell off my cycle.
139 Q. What time was this?
A. About 23 minutes past 11, I think.
Q. Did you fall off the bicycle?
A. Yes.
Q. When you fell off, what, if anything, did the American do?
A. He dropped his own bicycle and snatched mine away.
Q. What did he do with it?
A. Threw it on the wide grassy path.
Q. What did you do?
A. I ran away.
Q. What did the American do?
A. He ran after me.
Q. About how far did you run?
A. I can't say exactly. Not very far. I was nervous and lost the strength of my legs.
DEFENSE. Objected to.
LAW MEMBER. Objection overruled.
PROSECUTION. What happened then as you ran along?
A. He caught me up and dragged me to where his own cycle was lying in the road.
Q. How did he catch you?
A. From the back.
Q. How did he get his arms about you?
A. Around the top of my arms. I couldn't move them.
Q. What happened when he dragged you back?
A. He picked up his own cycle and threw it with mine. I got away again.
Q. What did you do then?
A. I ran away again.
Q. What happened as to the American?
A. Just the same thing. He ran after me and dragged me back.
Q. When he dragged you back the second time, what happened then?

140 A. He dragged me over on to this grassy path.

Q. About how far over on that path did he drag you?

A. I am not a very good judge of that.

Q. Can you give the court some idea in feet?

A. It was in the middle of this grassy path. It was very long grass.

Q. Looking at this bench in front of the court, would it be approximately that distance he dragged you? (Indicating approximately 8 or 10 feet.)

A. Yes, it would be.

Q. When he dragged you into this long grass, did he say anything?

A. No.

Q. What did he do to you when he dragged you into the grass?

A. He started pulling me down.

Q. Can you tell the court approximately what time this was?

A. It must have been about half past 11.

Q. Where was the place you were dragged into with relation to the second bridge you have already described to the court?

A. It was about 100 yards away from the bridge.

Q. Are there any houses in the vicinity there?

A. Yes, one. It stands back from the road on the right hand side.

Q. Do you know the name of that house?

A. An old lady lives there.

Q. Do you know what the cottage is called?

A. No, I don't.

Q. Are there any other houses along there?

A. No.

Q. How far beyond this particular house was it you were dragged into the long grass, as you recall?

A. On the opposite side of the road, and about 25 or 30 yards away—maybe more.

Q. When he dragged you into the long grass, what if anything happened?

A. I started making excuses—I said he would spoil my clothes and my father would come along in a minute
141 that I had to get up early in the morning—He didn't take any notice. He started taking his coat off.

Q. What next happened?

A. He got me on the ground and I started to scream.

Q. When you started to scream, what, if anything, did the American do?

A. Nothing the first time I screamed. When I screamed more, he started putting his hands on my throat and said if I didn't stop screaming, he would murder me.

Q. What did you do?

A. I didn't scream any more.

Q. Why?

A. I was so frightened of him.

Q. After that, what did he do?

A. He started pulling my clothes up.

Q. What did you do?

A. I started struggling.

Q. Tell the court how.

A. I was kicking my legs, and trying to push him off with my hands.

Q. What next occurred?

A. He finally did get my clothes up and I started taking my knickers off. I was kicking and struggling but he did get them off.

Q. What did he do with the knickers?

A. I don't remember.

Q. After he got your knickers off what next happened?

A. He laid on one of my legs and started pushing the other one apart with his hand.

Q. Which leg was he laying on?

A. On my right leg.

Q. What happened at this time? What were you doing?

A. Trying to push him off all the time.

Q. What part of his body was on your leg?

A. His chest.

Q. Where were his feet?

142 A. Well—

Q. With relation to your body?

A. His head was in my lap.

Q. As to your body, would his feet be along parallel with your body or at right angles to your body?

A. At right angles.

Q. When he was pushing your leg apart from your right leg, what next did you do, if anything?

A. I wanted to scream again; I think I did. I knew he put his hand over my mouth. I tried to push his hand away and then he got my leg apart and he started sucking me.

Q. Did you feel anything when you say he started sucking?

A. No.

Q. Did you feel any part of his person?

A. I felt his tongue.

Q. How long did this go on?

A. I couldn't say; it seemed ages to me but I should say about two or three minutes.

Q. What were you doing?

A. Trying to raise myself up to see if anybody was coming along the road, but he kept pushing me down again.

Q. After the two or three minutes elapsed, what next occurred?

A. He threw himself on top of me. He pulled my clothes up more and put his person in mine.

Q. When you say "person" do you mean his penis?

A. Yes.

Q. What if anything did you feel then?

A. I was too scared. I didn't dare to scream.

Q. Did you feel his penis in your private part?

A. Yes.

Q. How long did he keep his penis in your private part?

A. I couldn't say exactly. I should say 4 or 5 minutes.

Q. What was he doing while he had his penis in your private part?

143 A. Moving up and down, breathing very hard and using terrible swear words to himself.

Q. What was he saying?

A. Couldn't I write it down?

Q. Just say it once for the court. The members of the court will understand.

A. He said: "fucking" and "lovely cunt."

Q. After he moved up and down on you for three or four minutes, what next happened?

A. I tried to raise myself up and couldn't see anybody coming.

Q. At this time what was your condition?

A. I was very wet when he got off me.

Q. Where did you feel the wet?

A. On top of my legs and in my private.

Q. When he got off you, what happened?

A. I started making excuses, I wanted to get home.

Q. Did he do anything with your knickers?

A. He threw them at me and said: "You had better put these on again."

Q. What time was this?

A. I should say about a quarter to 12.

Q. Can you describe your condition to the court at that time after you had felt this wet? How did you feel? From the time he dragged you into this long grass, as I understand it you had been struggling with him. Is that right?

A. Yes.

Q. How did you feel after you felt this wet?

A. I was so nervous. I didn't have actually any strength in my body.

Q. As soon as the soldier got up and went away from you what did you do?

A. I put my knickers on and asked if he would get me my cycle.

Q. What happened then?

A. He did get it and brought it to me.

Q. What did you do?

144 A. He wanted to see me another night he said.

Q. What, if anything, did you say?

A. I was all for it because I wanted to get away. I thought if I said I would he would let me go. He said he wanted to meet me on Thursday night at 7 o'clock. First he said at the white bridge, then he said: "No, make it the other bridge, the one near the Bucks Horns." I said: "I will." He said: "I don't believe you will."

Q. Why did you say you would meet him?

A. I wanted to get away and get home. I was frightened that he would start everything all over again.

Q. What happened after you said you would meet him?

McN G

A. He wanted to kiss me good night and I think he did manage to. I let him. I saw he was getting mad again, so I let him do it to get away.

Q. Were you frightened at that time?

A. Yes.

Q. Where did you go?

A. Home.

Q. About what time was it you got home?

A. I should imagine 12 o'clock.

Q. What did you do when you got home?

A. I went around by the stairs and called my mother. I was crying.

Q. Can you describe the American you have talked about?

A. Yes. He has a roundish face, fair hair; there is a tooth missing on the left side and I think his other teeth are widely spaced.

Q. I ask you, Miss Dale, to look around the court room and point out if you can any man or the man about whom you were talking and about whom you related to the court performed the acts you have related?

A. The man over there.

Q. Where is he seated?

A. The second one. (Indicating the accused.)

Q. Sheila, is that the man you are talking about who performed the acts on you?

A. Yes.

Q. After you got home and complained to your mother, what did you do?

145 A. Mother came down and I don't remember what I said exactly. I said I had been attacked by a sexual maniac and that if I didn't give in to him, he would kill me.

Q. Did you see any doctor after that?

A. The next morning.

Q. That night when you came home, what did you do?

A. After Mother got down, my sister came down. I don't remember much. I was hysterical.

Q. After you talked with your sister and mother, what did you do?

A. I had a hot bath.

Q. And the next morning you went to a doctor?

A. Yes.

Q. After the 11th of July, did you see the accused again.

A. Yes, I believe it was six days after.

Q. Where did you see him?

A. Up here at an identity parade.

Q. When you talked with your mother and sister, did anyone else come in?

A. I think my sister went to fetch a soldier.

Q. Do you know the soldier's name?

A. I know him as Bill.

PROSECUTION. I hand you what has been marked as Prosecution's Exhibit 1 and ask you, can you identify that exhibit?

A. Yes, that is my skirt.

Q. How can you tell?

A. I know it is mine; that is all.

Q. Is there anything on it that you know it is yours?

A. There should be a mark on it. Here it is.

Q. What kind of mark is it?

A wet mark that

HJMcN 1971 A. I found it on my skirt when I got home that night.

Q. When was the last time you saw this skirt?

146 A. The next morning when I went to the doctor's.

Q. Did you give the skirt to anyone?

A. Yes, the policeman there—Mr. Felton.

Q. I hand you what has been marked Prosecution's Exhibit 2 and ask you if you can identify it.

A. Yes. It is a pair of knickers—my knickers.

Q. Was there anything on the knickers you discovered when you got home?

A. Yes, the same as on my skirt.

Q. What do you mean by that?

A. The discharge.

Q. Where was that, Sheila?

A. Right here. (Indicating the fork of the knickers.)

PROSECUTION. I ask leave to introduce these into evidence as Prosecution's Exhibits 1 and 2 and ask leave to withdraw them at the conclusion of the trial and substitute a reasonable description therefor.

PROSECUTION. Can you indicate to the court which is the front and back of your skirt?

The witness indicated the front as the portion with the pleats.

PROSECUTION. Where was the stain or the "wet" you described? In the back or the front?

WITNESS. I think it was the back.

DEFENSE. No objection.

LAW MEMBER. The clothing identified by the witness will be admitted into evidence as Prosecution's Exhibits 1 and 2.

PROSECUTION. I ask leave to withdraw them at the conclusion of the trial and substitute a reasonable description.

DEFENSE. No objection.

LAW MEMBER. That may be done.

Cross Examination.

Questions by DEFENSE.

Q. Miss Dale, on the night of July 11th, what time did you reach home for the first time?

A. I reached home about a quarter to nine that night.

147 Q. When you came home did you find anybody there?

A. My mother and my sister.

Q. What did you do then?

A. I had tea. I had an appointment that night but I arrived home late.

Q. What time did you have this appointment?

A. About 7:30 or 8.

Q. Whom did you have this appointment with?

A. A friend of mine—Kentucky.

Q. Do you know his correct name?

A. Raymond Eaves.

Q. Is he a member of the U. S. armed forces?

A. Yes.

Q. When you arrived home, was he there?

A. No.

Q. What happened at a quarter to 9 after you had your tea?

A. About a quarter past 9 my sister came in with Kentucky and California.

Q. What did you do then?

A. We stayed in the house until about 10:30.

Q. What were you doing then?

A. Talking—listening to the wireless.

Q. You had occasion at that time to pair off with Kentucky?

PROSECUTION. I am going to object. I don't see that it is in

HJMcN DPG relevant to the issues ~~of~~ this case whether she paired off.

LAW MEMBER. Objection overruled.

DEFENSE. Did you have occasion to pair off—two of you going into one room and the other two in another?

A. We all kept together.

Q. Until what time?

A. I would say 10:30.

Q. What happened then?

A. They asked us to ride back, which we did.

148 Q. To where?

A. Bergholt.

Q. How far did you ride?

A. We walked up the hill. We rode until we got to the hill.

Q. About what time did you reach that hill?

A. About a quarter or 10 until 11.

Q. Did you stop at the top of the hill?

A. Yes, we did.

Q. Did the four of you remain together?

A. No, my sister and her partner stopped and we walked on. I knew my sister would call me when she was going.

Q. How was it the four of you didn't remain together. Why did you walk off with Kentucky?

A. Nothing at all.

Q. You walked off with him and told your sister you were going to walk down the road?

A. No. They were walking in front and we in behind.

Q. You knew they had stopped?

A. Yes.

Q. But you continued walking up the road about 50 yards?

A. Yes.

Q. You stopped there in the road?

A. Just off to the side.

Q. Is it a straight road?

A. Yes.

Q. From where you were standing were you able to see your sister and the other soldier?

A. No.

Q. They couldn't see you either?

A. No.

Q. What did you say to Pam when you were down there, 50 yards away? Did you shout to her and tell her anything?

149 A. No.

Q. Did you tell her to call you when she was about to leave?

A. No; I knew she would.

Q. Did Kentucky have his bicycle with him?

A. Yes.

Q. Did you stand in the road with him?

A. Beside the road.

Q. Did you ride your bicycles further?

A. No.

Q. How long did you stay there?

A. About 10 minutes.

Q. About what time was that?

A. 11 o'clock. Then I heard my sister call.

Q. What did she say?

A. "Are you coming? I am going." I didn't answer. We started to walk back to where she was and we saw California riding by and I knew he had left her.

Q. Why didn't you answer? Were you preoccupied for the moment?

A. No, just talking?

Q. Did you have occasion to kiss Kentucky at that time?
A. No, I didn't.
Q. Did you kiss him at all?
A. I kissed him that night.
Q. When he left, did he kiss you?
A. Yes.
Q. Did he hold you tight?
PROSECUTION. Objection.
DEFENSE. It is possible the seminal fluid might be from someone other than the accused.
PROSECUTION. I ask that be stricken.
LAW MEMBER. Of course, the court understands the statement is not proof. Objection overruled.
DEFENSE. When you kissed Kentucky, did he hold you tight?
150 A. No, because the cycle was in between.
Q. Did he just lean across the bicycle and put his lips out and you kissed him?
A. Yes.
Q. He didn't put his hands on you at all?
A. No.
Q. It was what you would call a brotherly kiss?
A. Yes.
Q. Was that the only kiss that took place during the 10 minute period you were together?
A. Yes.
Q. This was at the end of the 10 minute period?
A. Yes.
Q. Then you started walking back toward where Pam was?
A. Yes.
Q. When you started back towards Pam, California came riding by. Kentucky was still with you, wasn't he?
A. California just rode right by—yes.
Q. He didn't stop and wait for Kentucky?
A. No.
Q. Did Kentucky say anything to him?
A. No.
Q. Did Kentucky continue walking back with you?
A. Yes.
Q. You weren't walking at that time—you were standing still.
A. We were walking.
Q. How far from the point you had originally gone to with Kentucky did you walk back when you saw California?

A. Not very far.

Q. Was it 400 yards?

A. No.

Q. 5 yards?

151 A. About that.

Q. How much farther did Kentucky walk with you?

A. To the top of the hill.

Q. When you got to the top of the hill what happened then?

A. I see Pam wasn't standing there so I thought she would be riding slowly and I would catch her up. He wanted to come with me as he didn't want me to ride back alone.

Q. About what time was this?

A. 5 after 11.

Q. He kissed you again and you went on?

A. Yes.

Q. There were two kisses occurred during that period—not one?

A. Yes.

Q. Did he sit on his cycle and you on yours and kiss you that fashion?

A. No, the cycle was between.

Q. He leaned across that and kissed you?

A. Yes.

Q. Then you continued on your way and he turned about and went back in the direction California had gone?

A. Yes.

Q. He didn't put his arms about you?

A. No.

Q. Did he put his arms about you at all during the entire evening?

A. No.

Q. Why was it you walked down the road with Kentucky? Why didn't you stay back with California and Pam?

A. I don't see there is any harm in walking in front of my sister.

Q. Why was it necessary for you to be alone?

PROSECUTION. Objection. He is merely arguing with the witness.

LAW MEMBER. Objection is sustained. That is argumentative.

DEFENSE: About what time was it you were at the top of the hill and Kentucky had just left you?

A. It was 5 past 11.

152 Q. What did you do then?

A. I started down to the bottom of the hill.

Q. How far did you go do you think?
A. About 100 or 150 yards.
Q. What did you see?
A. I saw it was getting dark and got my bicycle and started to walk.
Q. Did you have a lamp on your cycle?
A. No.
Q. What time was this?
A. About a minute or two after that.
Defense. I think the court should instruct the witness I think we can do without some of the facial expressions.
Law Member. That is something the court cannot control.
Defense. What time was it you first met this defendant?
A. I imagine at 10 past 11.
Q. How dark was it?
A. It was getting pretty dark.
Q. Didn't you say "Hello, Yank" when you saw him?
A. No.
Q. What did he say to you?
A. "Hello, there."
Q. What did you say?
A. I never answered.
Q. Did you get on your bicycle and try to get away?
A. Yes.
Q. You knew you weren't supposed to ride a bicycle after dark if you had no lights?
A. Yes.
Q. Did he say anything nasty to you at that time—say he had evil intentions?
A. No, he didn't; he just wanted me to stop. I didn't want anything to do with him.
153 Q. Hadn't you ever spoken to Yanks before?
A. Yes.
Q. Hadn't you ever met Yanks informally before, in that fashion?
A. No.
Q. Every one you met—you never met a Yank in the street and talked to him?
A. No.
Q. Neither have Yanks ever come to your home that you didn't know?
A. No.
Prosecution. I feel that unless Defense Counsel intends to connect this up he is merely on a fishing expedition and is taking the time of the court on something purely captious I think this matter is entirely irrelevant.

Law Member. The court does not see any particular relevance at the present time but on the other hand in the discretion of the court, you are authorized to proceed as you were.

Defense. Had you ever seen this defendant before 11:30 that evening?

A. Never.

Q. Never see him at any pub?

A. Never.

Q. Nor at the Bucks Horns?

A. Never.

Q. Never saw him along the road?

A. Never.

Q. When he came over to you, describe his condition. Did he appear to you to be drunk?

A. I didn't take that much notice. I didn't even look at him.

Q. You mean you were scared just as soon as you saw him?

A. Yes. When he started following me.

Q. When he asked if he could see you home?

A. I was all alone; there was nobody else. I was scared.

Q. You had never seen him before?

A. No.

Q. What did he do then?

A. He rode in front of my front wheel and I had to get off. He put his hand on mine—on my handle bars—
151 and wanted me to stop. I pulled myself away and—

Q. Did he say anything to you at that time?

A. He did say something. I didn't take notice.

Q. Isn't it a fact he asked to see you home?

A. Later on, yes.

Q. When you got back on your cycle and started to pedal off did you pedal quickly?

A. Yes.

Q. What did he do?

A. Caught up to me again.

Q. What happened then?

A. He asked me where I lived. I said: "Not far." He said: "Manning Tree?" and I said: "Yes."

Q. About how long did he continue to cycle along with you after he caught up again?

A. About 2 minutes. I thought Mother would be worried after Pam had got home.

Q. When you cycled along then, did he try to carry on a conversation with you?

A. Yes.

Q. What did he talk about?

A. I don't know. I was hoping there would be a policeman waiting on the corner, as there usually is, so he could see me home.

Q. When you got to the corner was anybody there?

A. No.

Q. Any American soldiers?

A. Just before we got to the corner, two American soldiers were coming toward us.

Q. Did you shout to the American soldiers?

A. No.

Q. You were trying to pedal away from this boy at the time?

A. Yes.

Q. When you got to the corner, you didn't see any constable or American M.P.?

155 A. No.

Q. What did the defendant do?

A. He continued to cycle.

Q. How long did you go?

A. Till he got me off the cycle.

Q. Tell the court what happened.

A. After we passed the short cut I started to cycle again and after about 100 or 150 yards he got hold of my handle bars and said: "You are going to stop here whether you like it or not" and shook my bicycle and I fell off.

Q. When you fell off the bicycle how far were you from the cottage you speak of?

A. It was on the opposite side of the road.

Q. How far?

A. About 50 to 75 yards.

Q. He threw you off the cycle and grasped hold of it?

A. He shook the handle bars so I fell off. He dropped his own cycle and pulled mine and threw it on the ground.

Q. Did he push you on the grass?

A. No, I ran away then.

Q. When you fell off the bicycle, where did you fall?

A. On the side of the road.

Q. Where was your bicycle?

A. I still held it with my one hand.

Q. You weren't free of the bicycle?

A. No.

Q. Where was his cycle when you fell on the side of the road?

A. He dropped that in the road.

Q. In the middle?

A. No, it fell as he got off, it fell toward the middle bu
wasn't actually in the middle of the road.

Q. Were you riding on the left side of the road?

A. Yes.

156 Q. What did he do then?

A. He dropped his own cycle and pulled mi
away from me and threw it on the grass.

Q. Did he throw it on to the grass on the left or rig
side of the road?

A. The left side.

Q. His cycle in the meantime was in the middle of th
road—did he get his cycle?

A. He dragged me back there.

Q. Did he hold with both his hands?

A. Yes.

Q. Then he let you go while he brought his bicycle back

A. When he lifted his cycle back, he used both hands.

Q. You were free for the moment?

A. Yes.

Q. Did you try to run toward the cottage?

A. No, I knew we were too far away.

Q. You started screaming?

A. Yes.

Q. Did you hit him?

A. No.

Q. You had already fallen to the ground before when h
pushed you from the bicycle?

A. Yes.

Q. What happened to your glasses?

A. I didn't hit my glasses and they didn't fall off—
they didn't fall right down.

Q. Your glasses didn't come off at all?

A. No.

Q. When he brought you back into this long grass, yo
struggled with him?

A. Yes.

Q. You were standing at that time?

A. Yes; I was making excuses too.

157 Q. Where were his arms?

A. Trying to push me down.

Q. Was he wrestling with you?

A. I suppose you would call it wrestling.

Q. Were both his arms around you?

A. Yes.

Q. Your glasses didn't come off?

A. No.

Q. Were those the glasses you were wearing at the time? (Indicating the glasses on the witness' nose.)

A. Yes.

Q. Did you wear those glasses when he forced you on to the ground?

A. Yes.

Q. Did they fall off then?

A. No.

Q. During the entire struggle which took place—during that 15 or 20 minutes—your glasses didn't fall off once?

A. No.

Q. He hit you in the face?

A. No.

Q. Where did he hit you?

A. Not at all.

Q. Did he strike you about the head?

A. No.

Q. When he forced you down he took your knickers off?

A. Not at first, no.

Q. What did he do?

A. Pulled my clothes up and I started screaming and he said he would murder me if I didn't stop screaming.

Q. Your knickers were still on?

158 A. Yes.

Q. What he do?

A. Then he got my knickers off.

Q. Did he put both hands about the elastic on the top and pull them down?

A. No, he didn't. I can't remember if he had one hand or two hands—how should I remember?

Q. You were wearing these at the time? (Indicating Prosecution's Exhibit 2.)

A. Yes.

Q. You don't remember whether he pulled them down with one hand or two hands?

A. No.

Q. Were you lying down at the time or standing up?

A. Lying on the ground.

Q. Was your head on the ground or were you sitting up in this fashion? (sitting on the desk)

A. Yes.

Q. You were looking for somebody?

A. Yes.

Q. And these were about your seat, weren't they?

A. Yes.

Q. You are trying to tell this court when you had [illegible] on, seated in this fashion, that boy was able to take [illegible] off?

A. No, he pushed my head down and after he threatened to murder me—

Q. Did you lift your hips for him so he could take the knickers off?

A. No.

Q. You kept yourself on the ground with these knickers on and this boy was trying to take them off you?

A. Yes.

Q. Were these knickers torn at all during the struggle?

A. I don't know.

Q. I show you these knickers and ask you are these knickers in the same condition now as they were on the evening you wore them?

159 A. Yes.

Q. Are there any tears on them?

A. Yes, there is.

Q. Where?

A. Here. (Indicating tear or slit seam in the fork).

PROSECUTION. I ask that the remarks of the Defense Counsel go out—about the seam—he said the split seam.

DEFENSE. What part of these knickers are now torn?

WITNESS. The seam is undone.

Q. There are no other tears on there?

A. No.

At this point the witness broke down and the court took a recess of 10 minutes at the end of which time the personnel of the court, prosecution and defense, and the accused and the reporter resumed their seats. The witness also resumed her seat.

DEFENSE. When he took the knickers off, he took them off both legs completely and threw them on the side of the road?

A. I don't know about that. I know he got them off.

Q. They were definitely off your person, weren't they?

A. Yes.

Q. When you made a statement to Mr. Felton, isn't it a fact you told him he only took the knickers off one leg?

A. I don't think so. I said I kicked and struggled and LJMcN OPG ~~when he threw them of me~~ I must have kicked them off completely.

Q. I show you a statement which you made to Mr. Felton and ask if this isn't so: "I struggled and screamed, but he managed to pull them off one leg." Is that correct?

A. No, that wasn't it at all. I don't remember.

Q. You don't know whether that was the statement you made?

A. I don't remember.

Q. I show you this statement and ask is this the statement you made to Mr. Felton?

A. Yes, it is.

DEFENSE. I ask that so much of it as makes reference to the knickers being taken off one leg be marked in evidence.

PROSECUTION. Her answer was she didn't remember whether she said that or not.

DEFENSE. She identified this statement and said it is the statement she made. I ask that that part of the statement be marked, for the credibility of the witness.

PROSECUTION. If he is going to offer part, he should offer it all, in fairness to the witness.

LAW MEMBER. I think it should be offered as a whole.

PROSECUTION. No objection.

LAW MEMBER. The statement will be received in evidence and marked Defense Exhibit A.

PROSECUTION. I might say the original is in the notebook of constable Felton. That is why the original is not here. It is a true copy of the original, insofar as I know.

LAW MEMBER. Will the accused agree that the copy may be introduced in evidence.

ACCUSED. Yes.

LAW MEMBER. It will be received in evidence.

DEFENSE. I should like to read from the statement: "I struggled and screamed but he managed to pull them off one leg."

DEFENSE. During all this period, you were pleading with the defendant to allow you to go?

A. Yes.

Q. What did you tell him?

A. I said my father would be coming to get me and I had to get up early in the morning, and it would spoil my clothes.

Q. Did you tell him you would meet him another night?

A. Yes—to get away from him.

Q. Did you tell him you were undergoing a menstrual period and couldn't undergo any relations with him?

A. I don't understand you.

Q. Did you tell him you had a period then and couldn't have relations with him?

A. No.

Q. Did you tell him you would meet him another night for that reason?

161 Prosecution. Unless the Defense states he has evidence he will produce to the court to contradict the witness, I object to this line of questioning.

Defense. This all goes to the question of whether or not the witness may or may not have given her consent to the relation.

Law Member. Objection overruled.

Defense. Did you tell him you were undergoing a menstrual period?

Witness. No.

Q. Did you tell him you couldn't have relations with him because of that?

A. No.

Q. Did you tell him you would meet him another night?

A. I don't remember.

Q. When he began to put his head into your lap, was your back on the ground at that time or were you seated upright?

A. I don't remember.

Q. You don't remember whether or not you were seated in this fashion or whether you were lying down?

A. No.

Q. Could it have been he put his head in your lap while you were seated upright?

Prosecution. I object again.

Defense. His purpose is to break up the whole line—

Prosecution. The witness has stated she doesn't remember if she was seated upright or lying down.

Defense. The next question was: "Were you seated—"

Prosecution. She has already—

Law Member. Objection overruled.

Defense. Could it have been he began to mouth you while you were seated upright?

A. No.

Q. You are sure you were on your back at that time?

A. Yes.

Q. How long did he remain with his head in your lap?

A. I don't remember—maybe 3 or 4 minutes.

162 Q. While he was lying there at right angles to you, did you attempt to bring your body up to look about to see anything—or if anybody was passing?

A. Yes.

Q. His feet were extended away from you, his face was in your lap, and which hand did he use to push you down with when you attempted to get up?

A. His left hand.

Q. Did he strike you at that time?

A. No.

Q. Did you manage to get up at all during this time?

A. No.

Q. He was able to get you down firmly with his left hand and keep his face in your lap?

A. Yes.

Q. His body wasn't on top of you at all?

A. No.

Q. Did you try to struggle under his hand while his hand was holding you?

A. Yes. I tried to fight him.

Q. While you were moving your head about, your glasses didn't come off at all?

A. No.

Q. Will you remove those glasses just a moment please? The witness removed her glasses.

Q. When you wear these glasses do they press into the side of your temples or are they loose fitting.

A. They fit tightly at the nose.

Q. Put them on. May I remove them, please?

The Defendant Counsel removed the glasses from the witness' nose.

DEFENSE. When he finished mouthing you and you were lying in this prone condition, you testified you were quite exhausted, weren't you?

A. Yes.

Q. Did you continue to move about when he finished mouthing you? Did you put your legs together?

A. Yes. He was so much stronger than me he mastered me every time.

163. Q. Did he continue using his left hand and pushing you down with it?

A. Not when he got on top of me.

Q. Before he got on top of you?

A. His body was lying on the ground and he had his head in my lap.

Q. And how did he manage to get from on the ground to your body when you were trying to get up?

A. He did do it.

Q. Did he keep his left hand on your face?

A. He brought his hands up and pushed me down.

Q. He was lying at right angles to you and brought both hands up and held your shoulders with both hands?

A. Yes.

Q. Did you try to kick him in the crotch at that time?

A. I didn't dare.

Q. Why?

A. I didn't have the right shoes on. If I had kicked him there, it would have killed him.

Q. With both hands on your two shoulders he moved his person from the ground?

A. All I know I couldn't move.

Q. Did you attempt to cross your legs?

A. I did everything I could.

Q. Did you cross your legs when he attempted to get on top of you?

A. I don't remember.

Q. When he did get on top, did he insert himself into you or did you help him?

A. I didn't help him at all.

Q. Did he fumble about and have difficulty or was he able to penetrate immediately?

A. He had difficulty. I struggled all I could.

Q. Did you try to move your hips out from under him?

A. I couldn't he was hurting me so.

164 Q. Did you try to cross your legs?

A. I couldn't.

Q. You hadn't seen his person until then?

A. I didn't see it then.

Q. It very well could have been his fingers, as well as his person?

A. His finger could not have hurt me that way.

Q. You don't know whether it could or couldn't. You told the court you never saw his person. Did he take his hands down to open his trousers?

A. I don't know.

Q. Did he put any contraceptive on?

A. No.

Q. Did he have his hand about your private parts at any time?

A. No.

Q. His hand was not there at all?

A. No.

Q. He didn't use it to insert himself into you?

A. I don't know. I can't remember.

Q. You said his hands were not around your private parts, didn't you?

A. I suppose so.

Q. His hands were not about your private parts?

PROSECUTION. I think the Defense Counsel should be instructed that the examination should be conducted fairly and without raising the voice so as to excite the young lady here. I think he can get what he wants from the witness in a fair and impartial manner.

LAW MEMBER. Let the Defense Counsel stay about 6 feet away from the witness, so she will not think you are threatening her.

(To the witness). Just realize you are here for the purpose of giving information and don't get excited or frightened.

DEFENSE. I must object now to the references made to the Defense Counsel. Defense Counsel must conduct the examination as he sees fit.

LAW MEMBER. Under the supervision of the court.

DEFENSE. Exactly—but I am doing this in the defense of this boy.

LAW MEMBER. I would suggest you keep about 6 feet distance between you and the witness so the witness may fairly answer the questions you put to her.

165 DEFENSE. When you were first thrown into the long grass by this defendant—I withdraw that. Did you ever see this defendant at the Red Lion Public House in East Bergholt?

A. I have never been inside it.

Q. When you left the scene of this alleged crime you said you allowed the defendant to kiss you. Is that true?

A. At first I didn't. I struggled and then I saw he was getting mad again. I thought he was going to do it again, so I let him.

Q. Did he kiss you any time during the period he was either mouthing you or having relations with you? The only time he kissed you was when he left you?

A. Yes.

Q. Isn't it a fact when I spoke to you at Brantham Works you told me you had never kissed this defendant?

A. I didn't say no such thing.

Q. You don't remember saying you never kissed the defendant?

A. You stated you had been told I kissed him. I said I never kissed him; he kissed me.

Q. Where did he kiss you?

A. On the mouth.

Q. When you left the scene what time was it when you finally left there, do you think?

A. About a quarter to 12.

Q. Did you go directly home?

A. Yes.

Q. Did you ride the bicycle home or walk?

A. I rode.

Q. How long did it take from the place where the crime allegedly took place and the time you reached home?

A. 5 minutes.

Q. You reached home at what time?

A. I never looked at the time.

Q. Didn't you tell me you reached him at 12 o'clock?

A. I am only just judging. It was about 12.

Q. How long was it you talked to your mother and sister, before your sister went for Pvt. Vandergrift, whom you referred to as "Bill"?

166 A. I couldn't tell; I was too hysterical.

Q. Were you in the house a half hour?

A. I don't know.

Q. Were you in the house a minute?

A. I don't know.

PROSECUTION. Objection.

LAW MEMBER. Overruled.

DEFENSE. Were you in the house an hour before Pvt. Vandergrift was sent for?

A. I don't remember.

Q. When Pvt. Vandergrift came in what did you tell him?

A. I was screaming; I was too hysterical. I don't remember.

Q. Isn't it a fact you told him two soldiers came along the road and the defendant was scared off and he left you?

A. No.

Q. You didn't say that to him?

A. I don't remember.

Q. Did you say anything to Vandergrift, or your mother or sister about two soldiers coming along the road and scaring this defendant off?

A. No.

Q. Do you remember seeing two Americans coming down the road?

A. Yes.

Q. Did the defendant leave before or after they passed you?

A. The only time I saw two soldiers was when I first met him and he shouted something to them and they went on.

Q. While you were in the long grass, you didn't see the soldiers at all?

A. No. Just before I got home there were two lights coming along the street.

Q. You don't know if they were driven by Americans or British?

A. No.

Q. There wasn't any two soldiers who scared this soldier off?

A. No.

167 Q. You are sure of that?

A. Yes.

Examination by the Court.

President of the Court. There have been a number of questions about the time. Were you wearing your watch that evening?

A. No.

Q. How do you place the time of certain events?

A. Just by my own judgment.

Q. At some time in the evening did you look at a watch or clock or did someone mention the time?

A. When we left home I saw the clock.

Q. What time was it then?

A. Half past 10.

Q. At any time after that did you know exactly what time it was by someone saying: "It's 11:30—I'm going home"—or any such statement?

A. No.

Q. Did you see a clock or watch when you returned after the incident?

A. No.

Q. When you were lying in the grass and screaming—the first time you screamed you said the accused made a certain statement—said something to you. What again were his words?

A. He said if I didn't stop screaming he would murder me.

Q. Did he use that word or some other word?

A. Just that word.

Q. Did he say anything else of a threatening nature at that time or after your next scream?

A. No.

Q. Can you recall the position he was in? You answered before his body was at right angles to yours. Was it in that general position or can you remember if it was any other?

A. It was right angles as nearly as I can remember it.

Q. When he got on top of you how did he move your legs apart?

A. I don't remember.

Law Member. Some reference has been made in the testimony to a menstrual period. Were you in the midst of a menstrual period at the time this occurred?

168 A. No, I had just finished.

Q. How many days before had you finished?

A. I had been finished about three days.

President of Court. When you made excuses, as you answered before, when he was attempting to get on top of you, what was the purpose of those excuses? Why did you make those excuses?

A. I thought perhaps he would let me go.

Law Member. (To President of Court) When you say "excuses" are you referring to any statement that she was in the midst of a menstrual period?

President of Court. No. She said her father was coming, her clothes would be spoiled, etc.

President of Court. (To witness) Your object in making remarks

HJMcN DPG

those was why?

A. I thought perhaps he would let me go.

Q. When you arrived home and talked to your mother and sister, before you took the hot bath, did your mother or sister or you look at your body when you took off your clothes?

A. Mom did when I took off my clothes.

Q. Were there any marks on your body that had not been there prior to that evening?

A. I got scratches on my knee.

Q. What sort of scratches?

A. In the long grass there were brambles and I remember scratching myself.

Q. How did you get the scratches on your knee?

Q. From the brambles—when he was dragging me on to the grass.

Q. Were you on your knees?

A. Yes, when he was getting me to the ground.

Q. Were there any other marks?

A. Not then; they didn't come out until the next morning. I had several bruises.

Q. They were on parts of your body you could see?

A. Yes.

Q. Describe the location of the bruises.

A. There were three on my right leg, another one on my left knee—above my knee—another bruise on my left arm here (indicating above the elbow).

Q. You know those bruises were not there prior to that evening?

169 A. No.

PROSECUTION. I don't think she understood your question, Colonel.

President of COURT. You know the bruises were not there before that evening?

A. Yes; I know they were not there that evening.

DEFENSE. At the time you were with Kentucky, you fixed the time about 11 o'clock, did you hear the bells ringing—the 11 o'clock bells?

A. No.

Q. I don't quite understand how you got the bruises on your knees. Were they in front of your knee caps?

A. I said they were above my knees. (The witness indicated her knee caps)

Q. They were grazes?

A. They were bruises.

Q. You say you got scratched on the knee cap coming thru the brambles. Do you mean the brambles were that high they touched your knees?

A. Yes, the grass was very high and I think they are blackberry brambles and come that high.

Q. Blackberry brambles as high as your knee caps?

A. Yes.

President of COURT. When I asked about scratches before, you said in one place he was dragging you thru the bushes and one or both knees were on the ground. I think you said Yes. Was he dragging you on your knees?

A. No, my knees were not on the ground.

Q. You said he dragged you back. What do you mean by "dragged you back" after you ran away from him?

A. He got me from the back and put his arms on top of my arms and pulled me back.

Q. You were on your feet at that time?

A. Yes.

DAVIDSON, JAMES, DR., a British civilian, a witness for the Prosecution, was sworn and testified as follows:

Direct Examination.

Questions by PROSECUTION.

Q. What is your name?

A. Dr. James Davidson.

170. Q. What is your business or profession?

A. Medical practitioner and director of the Metropolitan Police Laboratory.

Q. Where did you take your university training?

A. Edinburgh University.

Q. What did the course consist of?

A. The usual course—practitioner of medicine.

HJMcN DPG Q. Enumerate some of the courses, please.

A. Pathology and forensic medicine.

Q. For how long a period did you study at the University of Edinburgh?

A. Five years.

Q. Did you obtain a degree there?

A. I did.

Q. What date?

A. 1920.

Q. After you obtained your degree, did you engage in any private practice of medicine for any particular length of time?

A. No.

Q. Where did you then go after receiving the degree?

A. I was a house physician for six months and then I started laboratory work which I have carried on ever since.

Q. Has that been at the Metropolitan Police Laboratory?

A. No. In Edinburgh until the year 1935.

Q. After 1935 did you then go to the Metropolitan Police Laboratory?

A. I inaugurated the Metropolitan Police Laboratory. I opened it.

year.

HJMcN DPG Q. On what ~~day~~?

A. In 1935.

Q. Have you been engaged in the work and head of the Metropolitan Police Laboratory since that time?

A. I have.

Q. In this work and as head of the Metropolitan Police Laboratory what did you do?

171 A. I do laboratory work, examination, laboratory examination of various types, materials which have been submitted from various types of crimes.

Q. Doctor, on or about 20 July 1944, did you receive a pair of knickers and a skirt from the constabulary Clacton-on-the-Sea?

A. I did.

PROSECUTION. May the witness refer to his memoranda?

DEFENSE. No objection.

LAW MEMBER. You are satisfied the doctor is testifying about one of these articles of clothes introduced in evidence?

DEFENSE. No, he will have to identify that.

PROSECUTION. All I said was did he receive a pair of knickers and a skirt and he said Yes.

PROSECUTION (to witness). I hand you what has been marked Prosecution's Exhibit 1 and ask you can you identify that exhibit?

A. Yes.

Q. What is it?

A. A skirt.

Q. How do you identify it?

A. By the color and type and by certain marks which I have placed here.

Q. That mark is what?

A. That mark is an area of seminal staining.

Q. I hand you what has been marked Prosecution's Exhibit 2 and ask you if you can identify that?

A. Yes. It is the pair of knickers.

Q. How can you identify it?

A. By the color and by certain marks I have made on it, and I have also cut a piece of the material out for examination.

HEMEN 1093 Q. Doctor, referring to Prosecution's Exhibit 1 and 2, did you make any test concerning the exhibits?

A. I did.

Q. What, if any, test did you make?

A. I examined certain stains which were present. On the skirt there was a stain on the near surface of the back, which, on examination, proved to be that of a seminal stain.

The knickers show extensive staining in the
172 region of the fork and an examination proves that to be seminal fluid.

Q. What examination did you perform in order to have indicated to you the stains were due to semen?

A. A microscopic examination.

Q. How could you tell from a microscopic examination the stains which appeared on Prosecution's Exhibits 1 and 2 were semen?

A. By the presence of what are known as spermatozoa or male seed, which are quite obvious and can only be present in seminal fluid.

Q. What is seminal fluid?

A. Seminal fluid is the secretion which is produced by the male in the impregnation of the female.

Q. What brings forth the semen of the male during what act?

A. The act of sexual intercourse.

Q. When did you make this examination, doctor?

A. I would have to refer to certain notes to refresh my recollection—I made the examination on the 22nd of July.

Q. Where?

A. In the laboratory.

Q. Did you bring Prosecution's Exhibits 1 and 2 with you today?

A. I did.

Q. They have been under your control and possession since the 20th of July?

A. Yes, they have.

Cross Examination.

Questions by Defense.

Q. Doctor, with reference to this semen, how long does this spermatozoa remain alive in the semen?

A. It does not remain alive any length of time. Whenever a stain dries the spermatozoa die, but remain there as dead specimens.

Q. Would that be visible any length of time?

A. Yes.

Q. For as long as 11 days?

A. Yes, most certainly.

Q. When you made the microscopic examination of these stains in those two garments—if the stain had once been in the vagina would there be any difference?

173 A. Yes. I would still recognize it as seminal fluid.

Q. If you viewed microscopically a seminal stain that had been in a woman's vagina and semen that had not been in the vagina, would you be able to see any difference under the microscope?

A. No—no great difference that you can be certain of. I find in my experience frequently when spermatozoa have been in the vagina and escape again, they have lost their tails.

Q. Do you find that to be almost the rule?

A. It is a very common observation.

Q. Upon examination of these two garments under the microscope, are you in a position to say whether or not the semen had been in the vagina?

A. No, I am not. I could say the spermatozoa were lacking in tails, but there is no definite proof it has been in the vagina. The only difference is in the stain in the pants.

Q. It could have been an ejeculation on the clothes and not coming out of the vagina at all?

A. That is a possibility.

Redirect Examination.

Questions by Prosecution:

Q. Doctor, when you made your examination, did there in fact appear some of the spermatozoa without tails?

A. Yes.

Q. And on the shirt?

A. Yes.

Q. On the pants also?

A. Yes.

Examination by the Court.

President of Court: Your test for semen is a positive test?

A. It is a positive test. You must see the spermatozoa before you can diagnose seminal fluid.

Recross Examination.

Questions by Defense:

Q. The Trial Judge Advocate asked you whether or not any of the spermatozoa had tails?

A. Yes.

Q. It is a fact there were some on this garment that did have tails?

A. Yes. Some of the spermatozoa had tails and some had not, but one cannot give a definite opinion whether or not it has been in the vagina or not.

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The witness was then excused and withdrew from the room.

Beckett, Frederick H. E., Dr., a British civilian, a witness for the Prosecution, was sworn and testified as follows:

Direct Examination.

Questions by Prosecution.

Q. What is your name?

A. Dr. Frederick Harry Eli Beckett.

Q. What is your business or profession?

A. Medical practitioner.

Q. Where do you practice?

A. Manning Tree, Essex.

Q. Did you have any university training?

A. Yes. London.
Q. For how long a period of time?
A. About 7 years.
Q. Where was it?
A. University of London.
Q. Were the courses you took medical courses?
A. Yes.
Q. When did you receive your degree?
A. In April 1932.
Q. Since that time have you engaged in the practice of medicine?
A. Yes—the whole time.
Q. Have you specialized in any one particular type of practice?
A. I am only a general practitioner.
Q. Did you have any interneship or act as house physician at any hospital?
A. Yes.
Q. Where was that?
A. Do you want them all?
Q. A few.
A. The Radcliffe at Oxford, the Lincoln County at Lincoln, Royal at Portsmouth, the Selly Oak—
Q. Calling your attention to the 12th of July, 1944, about 10 o'clock in the morning, did you have occasion to examine the girl known to you as Winifred Dale?
A. Yes, I did.
Q. Where did that take place?
A. At my house in Manning Tree.
Q. What examination did you make of the girl?
A. She had a complaint of something and I therefore rang the police and waited until the police came down and then examined her from top to toe, really.
Q. What did your examination disclose?
A. She had some bruises of the right thigh, her left arm, left knee and a graze on the left knee.
Q. What was the appearance of those bruises?
A. They were fresh bruises.
Q. What do you mean by that?
A. They had occurred recently. It was not a week ago—they weren't yellow.
Q. Did you make any further examination of the girl?
A. I did a vaginal examination.
Q. What did that disclose?
A. She was not virgo intacta.

Q. What does that mean in lay language?

A. She was not a virgin.

Q. In other words, the hymen had been broken?

A. Yes.

Q. As a result of her complaint did you have any test made?

A. Yes. I referred her to the East Sufolk and Ipswitch Hospital, where they did a Zondek-Aschheim.

DEFENSE. I object.

LAW MEMBER. I think it depends on the doctor's acts in participating in the test. Overruled.

176 WITNESS. I rang the pathological laboratory at Ipswitch and they told me it was positive.

DEFENSE. I object and ask that that be stricken.

LAW MEMBER. Objection sustained and it will be stricken.

PROSECUTION. May the doctor explain so the court will know.

WITNESS. I did do another test myself. If one injects a substance called prostigmine, menstruation in a normal woman is supposed to follow within three to four hours. I gave her three injections in three successive days. They were negative. That is a test for pregnancy.

LAW MEMBER. Is that a positive test?

WITNESS. I don't think it is as positive as the Zondek-Aschheim.

PROSECUTION. When you state the prostigmine test was positive, what do you mean?

A. She did not menstruate after it.

Q. Your examination disclosed after three injections of the drug that she did not menstruate?

A. Yes.

Q. What did that mean to you?

A. It suggested she was pregnant.

Cross Examination.

Questions by DEFENSE.

Q. Were you able to say, Dr. Beckett, by virtue of this test and by virtue of the examination at what stage the pregnancy was?

A. No. The physical examination revealed no signs of pregnancy and the prostigmine test—no I am not a sufficient pathologist to tell you how long a woman has to be pregnant for this test to be positive.

LAW MEMBER. Is that the rabbit test?

A. Yes. I am not sure how far a woman has to be pregnant.

DEFENSE. It is a fact that this prostigmine test is not a positive test and while the patient would not have her period she still would not be pregnant?

A. I think if I were to answer truthfully, without knowing the actual percentage, it is an accepted test for pregnancy but I wouldn't say it was as reliable as the Zondek-Aschheim.

Q. It is not used to the same extent as the Zondek-Aschheim?

A. No, because it is a comparatively recent thing. I think it is only in the last two or three years.

177 Q. Does this test suggest any fashion whatsoever under which you could examine her subsequently and determine the stage of pregnancy. After giving this test, does anything appear whereby you could state the stage of the pregnancy?

A. Well, if a woman pregnant were to abort one could tell how far she was pregnant by the products, but you see if this test is positive, nothing happens. If you inject prostigmine and a woman is pregnant, she doesn't menstruate.

Q. Does it cause her to abort?

A. They say no. They say it can be safely given as a test to a woman without causing abortion.

Q. When this girl came to see you, did she come to you with the view of getting this prostigmine test?

A. No, she came complaining she had been raped by a man and no contraceptives were used and she was worried about it in case she be pregnant.

Q. Didn't you inform her that during the first three weeks of pregnancy nothing could be done and you could not make an accurate test as to whether she was pregnant?

A. With regard to an ordinary pelvic examination of a woman, unless you are an expert gynecologist, you cannot make an accurate test.

Q. Would the Zondek-Aschheim or this prostigmine test indicate that there was a pregnancy where that conception had taken place within 24 hours preceding?

A. No, I don't think so. I mean the test was not given then. It was sometime afterwards these tests were done.

LAW MEMBER. Only tell what you actually know. If you only know by what someone told you, that is not competent.

WITNESS. I have a record that 1 cc of prostigmine was given on the 2nd of this month.

DEFENSE. When did you send her for the Zondek-Aschheim?

A. On the 15th I sent her to see Mr. Stansfield at Ipswitch.

DEFENSE. I ask that all the testimony with reference to the Zondek-Aschheim test be stricken from the record on the ground that it took place three to four weeks after the commission of the offense on July 11th. You certainly cannot link up the 11th with tests which occurred in a case of this kind.

LAW MEMBER. Objection overruled except to the extent that the results of the test have heretofore been eliminated by the court.

DEFENSE. That would refer only to the Zondek-Aschheim test?

LAW MEMBER. Yes.

DEFENSE. As to the prostigmine test?

LAW MEMBER. That will be considered by the court.

DEFENSE. Despite the intervening period of almost four weeks?

178 LAW MEMBER. Despite that.

DEFENSE. Dr. Beckett, these bruises you found upon the person of Miss Dale—could they not have been bruises incurred in a bicycle fall?

A. Possibly. I have no evidence. I can't say how they occurred.

Q. When you spoke to her, she complained the bruises had been incurred during the 24 hour preceding period, didn't she?

A. Yes.

Q. If they were manual bruises inflicted by a rough hand, would you be able to observe them at 12 or 14 hours later?

A. I suppose you might.

Q. Would you be able to say at such an examination which occurred 12 to 14 hours later these were bruises incurred by a rough hand?

A. One might under certain circumstances, if imprints of the fingers were there, but that wasn't so in this case.

Q. There weren't any imprints about her neck?

A. No.

Q. Any imprints around the pelvic area?

LAW MEMBER. Were there any bruises around the pelvic area?

A. No—I didn't notice any except on the right thigh, the left knee and left arm.

DEFENSE. How far above the knee was the bruise on the left knee?

A. About half way up, I should say.

Q. You said it could have been incurred by a bicycle fall?

A. I would say it was possible.

Q. At an examination held 12 to 14 hours after intercourse allegedly takes place, are you in a position to say whether or not intercourse has taken place?

A. In the case of a virgin, I think one could say there would be evidence of the breaking of the hymen, but in the case of a girl not a virgin, I don't see how one could, except by—

Q. Would you be able to tell by the presence of spermatozoa in her vagina?

A. I wouldn't think so, after that 12 hour period.

Q. Did you make an examination of her vagina?

A. Yes.

179 Q. Did you note she was bruised inside of her?

A. No.

Q. But she wasn't virgo intacta?

A. No.

Q. Did you make a manual observation?

A. Yes.

Q. Did you observe at that time—and would you say she was sore about her person?

A. No, I don't think so.

Q. If the patient had been treated roughly and if at the time of intercourse she complained of great pain, would an examination 12 hours later indicate signs about her person that she had been treated roughly?

Prosecution. Objection to that question.

Law Member. Objection overruled.

Witness. Well, it might. It would depend on how one conducted such an examination. I did a pelvic examination in which one uses two fingers and looked for abrasions to see if the hymen had been recently torn. That I did not find. My examination would, in all probability, be much more gentle than the action you suggest.

Law Member. If this girl had been roughly treated and to such an extent she experienced pain on penetration, would there be some physical manifestation on her person at the time you examined her of such force?

A. It is difficult to answer, sir. One's fingers—there is a question of size—and I think an object as large as—

In view of the obvious embarrassment of the witness the Prosecution stated:

Prosecution. If it is a question of embarrassment, you can speak frankly.

Witness. I think a person who had been raped might show signs even if a virgin would definitely show signs, and a woman who is not a virgin might. It would depend upon the amount of intercourse she had had and the anatomical stature of the man who had had intercourse with her. My fingers are not long and not very large and probably would not give rise to discomfort. We are used to examining people to avoid giving them pain. The answer is it might.

Prosecution. I ask that his answer go out. What might have been are the saddest words of tongue and pen.

Law Member. Objection overruled.

Defense. We are trying to determine whether or not upon an examination 12 hours after an alleged rape, if she were roughly treated, would you be able to determine it then?

180 A. You might. It would depend on the anatomical size of the man.

Law Member. Your answer is—you might or you might not?

A. Yes, sir.

Examination by the Court.

Member of Court. Would you say the hymen had not recently been torn?

A. Yes, sir. There was no evidence of recent—no injury in the vagina at all that I noted.

President of Court. When did your examination take place?

A. After surgery hours—that would be about 10 o'clock on the 12th of July.

Q. Was there any indication to your eye in the examination of the girl of any abrasion or tearing of tissue or anything that would indicate force?

A. She had the bruises I have mentioned. I did not note any other injuries except those I have mentioned.

Q. Did she, in fact, have an abortion at any time after the 12th? That you know of?

A. No.

The witness was then excused and withdrawn from the room.

The court then at 1:00 P. M. recessed until 2:00 P. M., at which time the personnel of the court, the Prosecution and Defense, the accused and the reporter resumed their seats.

DALE, PAMELA JOY, a civilian, residing at Victoria Cottages, Station Road, Lawford, a witness for the Prosecution, was sworn and testified as follows:

Direct Examination.

Questions by PROSECUTION.

Q. State your name, please.
A. Pamela Joy Dale.
Q. Where do you live?
A. Victoria Cottages, Manning Tree.
Q. How old are you?
A. 18 years.
Q. Do you work anywhere?
A. At the BX Plastics, Brantham.

181 Q. Calling your attention to the 11 of July 1944, at about midnight on that date, where were you? Or shortly before midnight?
A. I came downstairs when my sister came in.
Q. Were you at home?
A. I was indoors.
Q. Where had you come from?
A. From Bergholt.
Q. About what time was it you arrived home?
A. Just before half past 11.
Q. Was your sister, Winifred Dale, with you?
A. No.
Q. Did your sister, Winifred Dale, come home?
A. Yes.
Q. About what time was it she came home?
A. 10 minutes to 12 or 5 minutes to 12.
Q. How do you fix the time as being about 5 or 10 minutes to 12?
A. I couldn't tell exactly. I didn't look at the clock.
Q. What first attracted your attention to the fact that Winifred came home?
A. I was lying in bed and I heard her on the bicycle coming down the yard.
Q. What next occurred?
A. I heard her throw her bike outside the house. She opened the door and we heard a hysterical cry.
Q. Did she say anything at that time?
A. She came to the bottom of the stairs and said: "Mamma, come—be quick" and "Pam, why didn't you wait for me?" I immediately jumped out of bed and went downstair to her.
Q. Did you see Winifred Dale there?
A. Yes.

Q. What did you notice about your sister?

A. She was sitting in the kitchen with her head in her hands and her coat just on her shoulders and her blouse was undone at the neck and the snaps of her skirt were undone.

182 Q. Did she say anything at that time?

A. She said: "I am sure I have been attacked—"

DEFENSE. Object on the grounds there has been an intervening time from the alleged offense and the time of the conversation held by the witness on the chair now. There was an opportunity for her to have independent thought and therefore this conversation does not form part of the *res gestae*.

LAW MEMBER. How long after your sister came into the house did she make the statement?—You heard her first throw her bicycle down and then her voice downstairs and then you got out of bed and came downstairs and went into the kitchen where you found her. In the kitchen, when the statement was made—how long was that after she arrived home?"

WITNESS. About 5 minutes.

LAW MEMBER. The objection by Defense is sustained.

PROSECUTION. I would like to proffer for the record, if the court please, ~~that~~ If the witness were allowed to testify in answer to the question: "What if anything did your sister say?" the witness would say that she (her sister) had been assaulted by an American soldier. [(Referring to the last answer to the question by the witness as stated in open court *relative to witness saying her sister said "I am sure I have been attacked—"*

LAW MEMBER. The remark or answer of the witness will be stricken unless the T. J. A. wants it for record purposes.)]

This done out in hearing of court by whispering the proffer to Legionnaire to the Court Reporter.

DEFENSE. No, I ask it be stricken and that the court disregard it.

LAW MEMBER. Quite right.

PROSECUTION. For the record and as argument for the overruling of the objection made by Defense, I want to quote to the court G. C. M. case 228891, dated Jan. 21, 1943, found in the Bulletin of The Judge Advocate General of the Army dated January 1943, on the question of admissibility of evidence:

"(22) Hearsay; *res gestae*.—Accused was found guilty of rape, in violation of A. W. 92. The testimony of the victim, which was corroborated by a written confession of

the accused and by medical testimony, indicated that, immediately after the incident, the victim ran out of the house and down the street, where she met her sister. The sister was permitted to testify that the victim, upon meeting her, stated that accused had tried to choke her and had 'done that'. Held: The admission of the sister's testimony was proper. Evidence as to a complaint made shortly after the commission of the offense of rape is admissible for the purpose of corroborating the testimony of the prosecutrix relative to the *corpus delicti*. C. M. 228891, Jan. 21, 1943."

I say a matter of five minutes, testified to by the witness here, comes within the ruling made by The Judge Advocate General of the Army in that it was made shortly after the commission of the offense, in fact, as soon as the girl got to her home and the young lady who is testifying came down to the room where she found her sister.

LAW MEMBER. Objection is still sustained.

183 PROSECUTION. Also refer the court to pages 367 and 368, Section 199 and 200, Underhill on "Criminal Evidence."

LAW MEMBER. Objection still sustained.

PROSECUTION. Now, Pamela, did you see the skirt worn by your sister that evening?

A. Yes, I did.

PROSECUTION. I hand you what has been marked Prosecution's Exhibit 1 and ask if you can identify that exhibit?

A. Yes, that was the skirt my sister wore that night.

Q. Did you examine the skirt you have identified as Prosecution's Exhibit 1?

A. No, I did not.

HJMcN DPG Q. Look at it. Just glance at it. *Did* you see anything that night

HJMcN DPG about it, that was unusual?

A. There was a wet mark on it.

DEFENSE: Objected to and ask that it be stricken, in the absence of proof that the witness examined the skirt previously, the fact there was a stain there then—

LAW MEMBER. Objection overruled.

PROSECUTION. Where was that wet stain?

A. On the back of the skirt.

Q. Can you indicate to the court where you saw the wet stain?

The Witness indicated the back of the skirt.

Q. Did you see the knickers worn by your sister that evening?

A. No.

Q. After you had talked with your sister, did you leave the house?

A. Yes.

Q. Where did you go?

A. I knew there was an American soldier in the third house up the yard and we knew him. I knew he would be there and I wanted to go to the police that night.

DEFENSE. I object. It doesn't involve the defendant or the prosecutrix in this case.

PROSECUTION. I will connect it up.

184 LAW MEMBER. She can tell what she did.

DEFENSE. But about calling the police—

LAW MEMBER. About calling the police, that will be stricken and won't be regarded by the court.

PROSECUTION. Did you get the soldier?

A. Yes.

Q. Do you know his name?

A. All I know is Bill.

Q. Do you know where the soldier went?

A. He came out with me.

Q. Did he go to your house?

A. Yes. He came straight to the house.

Neither the Defense nor the Court cross-examined the witness, who was then excused and withdrawn from the room.

in view of the ruling of the Law Member on statements as part of the *res gestae*

PROSECUTION. Also, I would like to proffer for the record the following: If Mrs. Ellen May Dale, the mother of the girl, Sheila Winifred Dale, were called to testify, she would testify that: "Just after twelve o'clock I heard someone come in the front door and I could hear the person crying. Sheila then called out to me: 'I have been attacked by a maniac and if I hadn't given way to him he would have murdered me.'"

This was done not within hearing of the court whereupon the proffered testimony to the court reporter. HJMcN by DPG

VANDERGRIFT, WILLIAM, Pvt., 1260th MP Co., Det. "A", Station E-157, a witness for the Prosecution, was sworn and testified as follows:

Direct Examination

Questions by PROSECUTION.

Q. State your name, grade, organization and station.

A. William Vandergrift, Pvt., 1260th MP Co., Det A. this station.

Q. Do you know the accused in this case; if so, state his name.

A. All I know his name is Smith.

Q. Do you see him in the court room?

A. Yes, sir.

Q. Where is he seated?

The Witness indicated the accused.

185 Q. Calling your attention to the time of about 2345 hours on 11 July 1944, did you see Pamela Dale?

DEFENSE. Objected to as incompetent.

LAW MEMBER. Overruled.

PROSECUTION. I will connect it up.

WITNESS. I seen her about a quarter to 12, sir.

Q. As a result of seeing Pamela Dale, where did you go?

A. I was visiting three houses up from her home.

Q. When Pamela came where did you go?

A. To her home.

Q. You mean Pamela Dale's home?

A. Yes.

Q. Whom did you see there?

A. There was Winifred, Pamela and her mother.

Q. What condition did you see Winifred Dale in at that time? Describe her clothing.

A. Well, I thought for sure I seen dirt on the breast of her blouse. The condition she was in—she was crying, white, shaking, and the front of her blouse was open.

Q. Did Winifred Dale say anything to you at that time?

DEFENSE. Objected to on the ground that this does not form part of the *res gestae*.

LAW MEMBER. He can't state what she said.

Q. Did she say anything to you at that time?

A. Yes, sir.

Q. What did she say?

DEFENSE. Objected to as it does not form part of the *res gestae*.

LAW MEMBER. Objection sustained.

Prosecution. I again cite for the court the authorities which appear after the other objection was sustained as to whether or not the statements made to the witness by Winifred Dale are admissible.

Cross Examination.

186 Questions by Defense.

Q. Pvt. Vandergrift, when you saw Miss Dale, Miss Winnie Dale, where was this dirt?

A. I thought I seen it on the breast of her blouse.

Q. Was she buttoned up?

A. She was unbuttoned.

Defense. I show you this skirt and ask you if you recognize this skirt?

A. No, sir.

Q. How far were her buttons unbuttoned?

A. Just about two buttons.

Q. Sufficient to expose her breasts?

A. I saw them, sir.

Q. Were any red markings about them?

A. I couldn't tell you.

Q. Anything you noted?

A. I can't tell you.

Q. You spoke about dirt—what did you mean? Soup stains?

A. It was just a light mark of dirt.

Q. Do you mean soil that is outside?

A. I would call it just dust.

Q. It wasn't real pure black dirt?

A. No, but it was a marking on her dress.

Q. Was her hair unkempt?

A. Yes, sir.

Q. Did she have any lipstick on?

A. I wouldn't say so.

Q. Did she have her glasses on?

A. No, sir.

Q. Were her glasses broken?

A. I don't remember whether she told me they were broken or not. I think she told me she dropped them.

187 Examination by the Court.

President of Court. Did you notice her shoes?

A. No, sir.

Q. Did you notice the skirt she was wearing? The condition of it?

A. I didn't take notice.

The witness was then excused and withdrew from the room.

CULLUM, MIRIAM FLORENCE, 57 Colchester Road, Lawford, Essex, England, a civilian, a witness for the Prosecution, was sworn and testified as follows:

Direct Examination.

Questions by PROSECUTION.

Q. What is your name?
A. Miriam Florence Cullum.
Q. Where do you live?
A. 57 Colchester Road, Lawford, Essex, England.
Q. How old are you?
A. 19.
Q. Are you working now?
A. Yes.
Q. Where?
A. Wrabness Mining Depot.
Q. At about 20 minutes to 11 on the night of 11 July 1944, where were you at that time?
A. Just leaving Brantham.
Q. Where were you going?
A. Home.
Q. Was anyone with you at that time?
A. Yes.
Q. Who?
A. Mrs. Kerry.
188 Q. Were you walking or were you out, going home?
A. I was wheeling my cycle and walking.
Q. Did anything unusual happen as you were walking along with Mrs. Kerry? Did you see anyone pass you by?
A. Yes, an American soldier.
Q. What did that American say to you, if anything?
A. Nothing in the first place.
Q. Did you continue to walk on?
A. Yes.
Q. Did you see that American again?
A. Yes, he came back and stopped and asked us where we were going.
Q. What did you do then?
A. Mrs. Kerry replied "Yes."
Q. What then happened?
A. He asked us if he could see us home. Mrs. Kerry said: "No, thanks."
Q. At that time about what point had you reached in walking along?
A. We just had gotten around the corner.

Q. Did anything happen there?
A. No.
Q. Did you eventually come to the Crown Public House?
A. Yes.
Q. Did you see the American there?
A. He was still walking alongside us.
Q. What did he say at that time?
A. He asked us where we lived.
Q. What, if anything did you say?
A. Mrs. Kerry replied she lived at Braintham.
Q. Did you continue to walk on?
A. Yes.
Q. Did you get to a point between the two bridges on the way to Manning Tree?
A. Not then. The American moved off and asked if he could see us home again, and Mrs. Kerry said: "No thanks." and then she said Good Night to me. I got on my bicycle and at the bridge he caught me up.
189 Q. That was the same bridge?
A. Yes.
Q. What time was that?
A. 20 minutes to 11.
Q. When he caught you up, did he say anything to you?
A. He asked to see me home.
Q. What did you say?
A. No, thanks.
Q. What did he say?
A. "Please."
Q. At that time where were you?
A. On the roadway.
Q. Toward Manning Tree?
A. Between the two bridges.
Q. What happened at that time?
A. When we got over to the white bridge, just by the house, he asked me again to see me home and then he just turned the wheel of his cycle into mine and knocked me off.
Q. You mentioned the house—do you know the name of that house?
A. No.
Q. What side of the road is it on, going toward Manning Tree?
A. The right hand side.
Q. Are there any other houses around there?
A. No.
Q. When you fell off your cycle, when he turned his wheel into you, what happened to you?

A. I struck my head on a telegraph pole.
Q. What happened to your cycle?
A. It laid fallen on the grass ledge.
Q. What did the American do to you then?
A. He grabbed hold of me.
190 Q. Where did he grab hold of you?
A. My arms, I think.
Q. What did he do to you?
A. He tried to drag me over to the right of the field.
Q. What did you do to him?
A. I pulled his hair, scratched him and kicked him.
Q. What did he do then? Did he let you go?
A. No.
Q. Did you fall down at any time?
A. Yes.

DEFENSE. I ask that the Prosecution stop leading this witness.

PROSECUTION. I think because of the reluctance of the witness, to bring out the questions I should be permitted, in view of the type of the offense, to ask certain leading questions.

LAW MEMBER. It is very apparent to the court that the witness is either embarrassed or reluctant and I will allow the same line of questioning you are pursuing at the present time. (To Defense) If you later wish to make an objection, you may do so later on and we will rule on it then.

PROSECUTION. When you fell down what did he do?
A. He kicked my shoulder.
Q. Which shoulder?
A. The left.
Q. What else did he do?
A. I managed to get away from him over to the little bank on the field and just about to the roadway.
Q. Then what happened, Miriam?
A. I screamed again and he grabbed hold of my throat.
Q. When he grabbed your throat, how did he grab it?
A. I don't know how to describe it. He grabbed me here (indicating both sides of her neck).
Q. Could you scream then?
A. No, I was too terrified and lost my voice.
191 Q. Did he say anything to you at that time?
A. The whole while he was mumbling something.
Q. What did he say?
WITNESS. Could I write it down? I can't say it.
Q. Did he say: "I am going to fuck you"?
A. Yes.

Q. About how many times did he say that?

A. Several times but then he kept mumbling something I couldn't understand.

Q. When he said that, what did you do?

A. I just went on struggling.

Q. Did you try to bite him at that time?

A. Yes, I bit his hand.

HEMLOK 0367 Q. Did he hit you *on* the head at that time?

A. Yes.

HEMLOK 0368 Q. What did he hit you *on* the head with, if you know?

A. His clenched fist.

Q. Where were you when you bit his hand—with relation to the paved part of the roadway?

A. In the roadway.

Q. Did he get you off your feet other than at the one time when you fell down and he kicked you?

A. No.

Q. What happened then after you bit his hand?

A. It was then he grabbed me around the throat.

Q. Then what happened?

A. Before that once I managed to get away from him and I was going to run toward the station. Then he caught me and grabbed my throat.

Q. When that happened what was the relation of his body to you? Which way was he facing?

A. Toward Brantham.

Q. Could you see his face at that time?

192 A. Yes.

Q. Could you describe him? How did he look to you?

A. He just kept making faces.

Q. Describe his face.

A. He just kept narrowing his eyes.

Q. What color hair did he have?

A. Fair.

Q. How about his teeth?

A. There were several missing.

Q. Do you remember which side they were missing on?

A. The right I think?

Q. You are not sure of that?

DEFENSE. I object. He is bound by the first answer.

LAW MEMBER. The court does not consider it so.

At this point the witness broke down and started to sob, and the court took a recess of 10 minutes, at the end of which time the personnel of the court, the prosecution and

defense, and the accused and the reporter resumed their seats. The witness also returned to her seat.

PROSECUTION. I asked you whether or not he had some teeth out. Do you remember whether or not they were out on the right or left side of his mouth? If you don't remember now, say so.

A. I don't really remember.

Q. Do you recall what kind of uniform he had on that evening? The evening about which you have told the court?

A. An American uniform, no stripes.

Q. Do you remember what kind of cycle he was riding?

A. A high one.

Q. Do you remember the color?

A. I should think it was khaki, but I can't be sure.

DEFENSE. I ask that be stricken—she doesn't remember.

LAW MEMBER. Do you remember the color?

A. Only very vaguely I do.

LAW MEMBER. Was it painted dark or light?

193 A. I don't recall.

Q. You don't actually remember what color it was?

A. No.

LAW MEMBER. Objection sustained.

PROSECUTION. I ask you now to look around the court room and point out the man, if you see him here in the court room, who did the things to you you have related to the court on the evening of 11 July 1944.

A. Yes.

Q. Where is he seated?

The witness indicated to the right of the Defense Counsel, identifying Pvt. Smith, the accused.

PROSECUTION. At the time he had hold of your throat, did he do anything after that?

A. No.

Q. What happened then?

A. I was near enough to the side of the road where the bikes had fallen.

Q. Did anyone come along there?

A. Yes.

Q. Who?

A. Mr. Welham and a soldier.

Q. Just before those two men came along, what was the accused doing to you then? At the time he had hold of your throat and before the two men came along—Mr. Welham and the soldier—did the accused let you go?

A. Yes.

Q. How long was it, before the two men, Mr. Welham and the soldier, came along did Private Smith let you go?

A. A few seconds.

Q. What did Pvt. Smith do after he let you go?

A. He first got his cycle and rode toward Brantham.

Q. That would be in the opposite direction to Manning Tree?

A. Yes.

Q. What did you do?

A. I didn't know there was anyone coming up and I thought he was still somewhere about.

194 Q. Then what happened?

A. First Mr. Welham and the soldier went by a little way and came back again. I was trying to pick me bike up.

Q. What was your condition at that time?

A. I didn't know what I was doing.

Q. Were you crying?

A. Yes.

Q. Did you have some conversation with Mr. Welham?

A. He only asked me what happened and I told him.

Q. Who took you home?

A. Mr. Welham lived in the opposite direction and the soldier came home with me.

Q. About what time was it you got home?

A. Quarter past 11.

Q. Who did you see at home?

A. My father and mother.

Q. Did you tell them what happened?

A. Yes.

Q. The next day did you look at yourself to see if there were any marks on your body?

A. Yes.

Q. Where were those marks if any?

A. There were bruises on my left shoulder; I was stiff all over; there was a swelling at the right side of my throat and bruises on my legs.

Q. Where were the bruises on your legs.

The witness indicated the area between the knee and ankle, on the left leg.

Q. Were there any bruises on your right leg?

A. One on my foot and some here, but the left leg was the worst.

Q. After the 11th of July 1944, did you see the accused again?

A. No.

Q. Did you see him about a week later?

A. No.

195 Q. Did you see him here at the Raydon Aerodrome?

DEFENSE. Object to that.

LAW MEMBER. Overruled.

DEFENSE. May I ask that he place a time on that.

PROSECUTION. That was my next question.

LAW MEMBER. You can't dictate what the Trial Judge Advocate will ask.

PROSECUTION. Did you see him at the Raydon Aerodrome?

A. Yes.

Q. How long after the 11th of July was it?

A. Exactly a week.

Q. Was he in a line of men at that time?

A. Yes.

Q. At that time did you see Sheila Winifred Dale there at the Raydon Aerodrome?

A. Yes.

Q. Did she go with you at the same time you identified the accused at the Raydon Aerodrome?

A. No.

Q. You went alone, is that right?

A. Yes.

Q. How many men were standing there in line?

A. 15.

DEFENSE. I object to this line of questioning in reference to the identification parade. It is thoroughly incompetent, not part of the *res gestae* and I ask that it be stricken from the record.

LAW MEMBER. Objection overruled.

PROSECUTION. Did you then identify the accused?

A. Yes.

Cross Examination.

Questions by DEFENSE.

Q. Where were you walking when you first saw the defendant?

A. I was going to walk from the house I was at as far as the Crown.

196 Q. You were at Mrs. Kerry's house?

A. No, Mrs. Watson's. Mrs. Kerry lives with Mrs. Watson.

Q. How far is that from the Crown?—About what time was it you started out?

A. Half past 10.

Q. How long did it take you to walk to the Crown?

A. About 7 or 8 minutes.

Q. Shortly after you reached the Crown you met the defendant?

A. Just before I reached the Crown.

Q. You then were with Mrs. Kerry?

A. Yes.

Q. What did the defendant say to you or Mrs. Kerry and what did you answer?

A. I didn't answer him at all.

Q. What did he say?

A. He asked if he could see me home.

Q. Did he assault you at that time?

A. No.

Q. Did he appear under the influence of liquor?

A. I don't know anything about it.

Q. When he spoke to Mrs. Kerry and you was he most respectful?

A. I don't know how to answer that question.

Q. He wasn't nasty, was he?

A. In what way do you mean?

Q. Was he indecent?

A. No.

Q. He asked if he could walk you and Mrs. Kerry home?

A. He asked if he could see us home.

Q. What did you say?

A. I didn't answer him.

Q. What did Mrs. Kerry say?

A. "No, thank you."

197 Q. What happened then?

A. He asked Mrs. Kerry if she was my mother and she said no. He asked us where we lived. She said "Here." He said: "You might but she doesn't." He said: "She lives at Manning Tree."

Q. What did Mrs. Kerry then say?

A. Two special policemen were coming down the road and he said something about: "They are always after me" and said "Good night" to the two policemen.

Q. What did the two policemen say to him?

A. "Good night."

Q. Nothing more than "Good night"?

A. No.

Q. Did you say to the two policemen: "This boy is bothering me and wants to see me home"?

A. No.

Q. Did Mrs. Kerry say that he was bothering you?

A. No.

Q. He left you then, didn't he?

A. Yes.

Q. You and Mrs. Kerry proceeded together?

A. No, she said: "Good night."

Q. Who left first—Mrs. Kerry or this boy?

A. He moved off and she said "Good night" to me and went home.

Q. When Mrs. Kerry left, did you get on your bicycle?

A. Yes.

Q. And started to pedal on?

A. Yes.

Q. About what time was this?

A. Getting on to 20 to 11.

Q. How far had you gone from Mrs. Kerry when this boy came to you again?

A. Just before you get to the Crown.

Q. How much later? 5 minutes?

A. No.

198 Q. 10 minutes?

A. No; it was just a few seconds.

Q. Then it was just about 20 to 11 that you started towards the first bridge?

A. Yes.

Q. Did you ride over the first bridge to go with him?

A. No.

Q. What happened?

A. I just had an idea he was going to follow me—I don't know any Americans and have never spoken to them. He caught me up between the first bridge and the second bridge.

Q. Which side of the road were you riding on?

A. The left.

Q. Which side was he?

A. On my right side.

Q. Meaning you were closer to the grass on the side than he was?

A. Yes.

Q. How long did you ride together that way?

A. We didn't ride together. I was riding ahead of him.

Q. Then what happened?

A. He said could he see me home and I said: "No.

thanks." He said: "Please." And I said: "No, thanks," again. Then he rode his bike into me.

Q. What part?

A. Into my front wheel.

Q. Did that cause you to go over on the left hand side?

A. Yes.

Q. Did you fall off your bike?

A. Yes.

Q. When you fell off your bike what did he do? Was he still on his?

A. No, he fell off and grabbed hold of me.

Q. What did he do with the two bikes?

A. The one was on the grass and the other was half on the curb and half on the road.

199 Q. Was anybody in sight at that time?

A. No.

Q. Were any automobiles coming past?

A. No.

Q. In fact, the last individuals you had seen were these two constables going home?

A. Yes.

Q. Were any American soldiers coming along?

A. No.

Q. When you fell off on the left hand side of the road and the two bikes were lying on the ground, what happened then?

A. He grabbed hold of me.

Q. What part of your body?

A. I think it was my shoulders and arms.

Q. Did he grab your both hands and shake you?

A. No, he just dragged me over to the right hand side of the road.

Q. Weren't these two bikes in front of you and in your way?

A. Yes.

Q. What did you do?

A. One bike was here and the other there. I had one leg on either side of my cycle and he pulled me over and that is how I came to bruise the inside of my left leg.

Q. He picked you up physically from underneath the bicycle?

A. I wasn't underneath the bicycle.

Q. You say you had either leg on the bicycle?

A. Yes, but not underneath it.

Q. What happened then? How did he drag you—by the arm or pull you?

A. He pulled me by one arm and twisted it here. I pulled his hair.

Q. In that fashion you crossed over this road?

A. Yes.

Q. When you got to the other side of the road, what happened?

A. There is a little bank and a field—a corn field.

200 He dragged me into this corn field.

Q. About how far from the road is the corn field?

A. Just the road, the pavement and then the corn field.

Q. From the road, it would be about 6 or 8 feet? From where I am standing to where you are sitting?

A. No, a little farther.

The space indicated was about 10 or 12 feet.

Q. He kept on twisting your arm?

A. No because I struggled and he just grabbed hold of me.

Q. Did you try to kick him?

A. Yes.

Q. Did you try to kick him in the crotch?

A. No.

Q. Were you standing right up against him at any time so that you could have kicked him?

A. No.

Q. Was he pushing you in this fashion? (Indicating his arm behind his back.)

A. No.

Q. I can't understand the position you held to one another. When you finally got across the road and started into the field, what happened then?

A. We just went on struggling and I lost my balance.

Q. You fell on the ground?

A. Yes.

Q. While you were lying on the ground, he was standing up?

A. Yes.

Q. And he just kicked you?

A. Yes.

Q. Where were his hands?

A. I don't know; I didn't very much notice.

Q. Is that when he muttered these intimacies to you?

A. No, when I first fell off the bicycle.

201 Q. When he got you into the corn field, did you try to cajole him or laugh with him or kid him out of it?

A. No.

Q. When was it you bit his hand?
A. I managed to get away.
Q. You got back from the corn field on to the pavement?
A. Yes.
Q. Then what did you do?
A. I bit his hand.
Q. What did he do?
A. He swore and grabbed my throat.
Q. Did he try to pull you into the field?
A. Yes
Q. Did you get back into the field?
A. No.
Q. Why?
A. By that time I was half way on the road.
Q. This was about 10 of 11, wasn't it?
A. Yes.
Q. How much longer did you struggle with him?
A. Not very long.
Q. Another 3 or 4 minutes?
A. About that.
Q. Then you got up and he saw these two people coming?
A. Yes, he saw them coming.
Q. You are sure you didn't see them coming?
A. I had my back toward Brantham.
Q. And they were coming from Brantham?
A. Yes.
Q. What did he say to them?
A. He didn't say anything.
202 Q. What did you do?
A. By that time I didn't know what I was doing. I didn't know what was happening. I was too terrified. I was afraid and thought he was still around. He just gave me a push and I fell on my bike.
Q. You finally grabbed your bicycle and got on it?
A. No, he gave me a push.
Q. Were you on your bicycle when he pushed you?
A. No.
Q. Where were you? A. On the left hand side.
Q. When he pushed you, when you were right near the cycle he pushed you and then he left, didn't he?
A. Yes.
Q. Did you make a date to meet him again?
A. Certainly not.
Q. You say you bit him on the right hand?
A. I didn't say I bit him on the right hand. I just said I bit his hand.

Q. You made a statement to Lt. Todd, the Investigating Officer, and at that time you said you bit him on the right hand.

A. I don't remember.

DEFENSE. Let me refresh your recollection. I hand you the statement you made to Lt. Todd and ask you to look at it. Is that the statement you made to him?

A. Yes.

DEFENSE. I ask that it be marked and received in evidence.

LAW MEMBER. The statement will be admitted in evidence as Defense Exhibit B.

DEFENSE. I will read from this: "I screamed again and he put his hand over my mouth and said 'Shut up'. I bit his right hand and he caught me round the throat."

DEFENSE. How many statements did you make to Mr. Felton with reference to this crime?

A. One.

Q. When you made the statement to him, he took it in his notebook, didn't he?

203 A. Yes.

Q. Then when you came before Lt. Todd at that investigation, when the defendant asked you one or two questions, you told Mr. Felton you thought the statement they showed you was not the statement you made originally, didn't you?

A. I don't understand you.

Q. You made two statements in this case: the first was the special constable, the policeman. Then Mr. Felton came up and you made another statement. Mr. Felton said he didn't like the first statement and that was the reason you made the second statement.

A. No.

Q. Why did you make the second statement?

A. Because the first one was to a special constable.

Q. Do you remember the name of this special constable?

A. No.

Q. Was it Mr. Shepherd?

A. I don't know.

DEFENSE. I wish to call upon the Prosecution to produce the statement made by this witness to the Scotland Yard police. This one is the second one.

PROSECUTION. I don't believe I have it. To whom was it made?

DEFENSE. I don't believe it was made. There was a prior

statement made and he said it was inconsistent. Was it the second police officer you spoke to?

WITNESS. Yes.

Q. Do you remember speaking to a first police officer? He took certain notes didn't he?

A. Yes.

Q. Where did he take them?

A. At the police station at Mistley.

Q. When he finished taking those notes, did you sign his little book? Just as your signed Mr. Felton's later?

A. I don't remember.

Q. You remember making a statement to the first police officer, don't you?

A. Yes.

204 PROSECUTION. Have you seen the first statement?

DEFENSE. I have heard a great deal about it.

PROSECUTION. I object to the Counsel stating she has made statements which are inconsistent with the statement made now.

LAW MEMBER. I think the court understands that is not evidence. It will be disregarded by the court for any consideration whatever.

DEFENSE. At the time of this identification parade, when these 15 American soldiers were lined up, was there a C. I. D. agent or another American officer or a non-commissioned officer—I believe he was—standing and talking to this boy? When you walked out of this room into the yard where the 15 men were lined up, there was somebody standing and talking to this defendant, wasn't there?

HJMcN DPG

A. No.

Q. He was standing by himself?

A. No, he was standing in the middle of the line.

Q. Didn't you get out just to the beginning of the line, and he was standing in the middle of the line, and you saw him and there was somebody standing next to him and you broke down, isn't that what happened?

A. There was nobody talking to him when I went out.

Q. When you walked out there and the 15 men were lined up, was there a civilian standing there with his arm on this boy's shoulder?

A. No.

Q. Did you see any civilian standing in front of these 15 people at all?

A. One came up and told me what to do.

Q. What did he tell you to do?

A. He said: "When you pick him out, touch him."

Q. Where did he come from—the end of the line or was he standing in the middle of the line?

A. He was standing opposite the doorway.

Q. Was he standing in front of this accused?

A. No.

Q. Did you get a chance to look at the 15 men standing on the line there?

A. When the American in plain clothes told me what to do, I turned around and saw him immediately.

Q. Was he the only blond boy standing there?

A. I didn't see anybody else.

205 Q. He was the first blond, fair-haired boy you saw?

A. Yes.

Q. Did you notice any other men of the same size of this accused standing there, or was he taller than all the rest?

A. I just saw them and didn't look at any of the others.

Q. Did you notice whether or not any of these other boys were boys you had seen in Brantham or Manning Tree previously?

A. I have never spoken to Americans, I have never taken any notice of them.

Q. You have certainly seen certain Americans around town?

A. Yes.

Q. Could it have been some of these boys standing in this parade were boys you had seen in Brantham or Manning Tree?

A. No.

Q. You had never seen any of them?

A. No.

Q. You had seen him previously?

A. No.

Q. You had never seen him at a public house?

A. I never drink.

Q. Did you ever see him with Sheila Dale?

A. No.

Q. Have you ever seen him on a bicycle in town?

A. No.

Q. Have you ever seen him drunk?

A. No.

PROSECUTION. Miriam, when you went out to the identification parade, after you identified the accused, did you then walk along the line and look at the other men?

A. Yes.

Q. Did you look at each man separately as you went along the line?

A. Yes.

Q. After you picked out the accused—are you sure the man you identified today is the man who attacked you?

A. I would never forget his face.

Q. You are sure?

A. Yes.

206 Examination by the COURT.

President of COURT. Tell me about this man who attacked you and who you later identified in the line,—what about his uniform or face that made you sure that was the same man?

A. When I walked right up in front of him, he narrowed his eyes—the same as he did when he attacked me.

Q. You recognize friends by their appearance, by their face or clothes. What things about this man made you think he was the one?

A. I knew he had a roundish face and fair hair and knew when I saw him again—I recognized him.

Q. When you identified him in the line, did you see his teeth?

A. No.

Q. Is there anything else that happened the evening you were attacked that you haven't told us about? Something that hasn't been brought out by the questions? Anything that the man who attacked you did?

A. No.

Q. You have told us all you can remember?

A. Yes.

LAW MEMBER. Miss Cullum, at the time this assault took place, was it dark?

A. It was getting dusk.

Q. Do you remember what the black out time was on July 11th?

A. No.

Q. Was it about dusk when this assault took place, did you say?

A. It was only first getting dusk.

Q. At the time the assault took place, did you see the teeth of the man assaulting you?

A. Yes.

Q. You noticed several teeth were missing?

A. Yes.

Q. Did you ever know Sheila Dale before this trial came up?

A. I used to know her at school.

Q. Was Sheila Dale on the camp so far as you know when you identified the accused?

A. Yes.

Q. Did you see her here?

A. Yes.

207 Q. Did you identify the accused in the company of Sheila Dale?

A. No.

Q. Who went out first to look at the identification parade —you or Sheila?

A. I did.

Q. Where was the identification parade held? Did they have the men lined up in a building?

A. No.

Q. Outside?

A. Yes.

Q. Did you come from a room and go out and look at them?

A. Yes.

Q. Was Sheila Dale in the room when you went out?

A. Yes.

Q. When you came back did you tell her you had identified the man?

A. No.

Q. You didn't say anything to her at all about it?

A. No.

Q. When you first gave the police a description of the man who had attempted to assault you, had you talked to Sheila Dale before that?

A. No.

Q. Have you and Sheila Dale ever compared descriptions of the man that assaulted you?

A. I don't think so.

Q. I believe you said to the best of your knowledge you had never seen the accused before July 11th,—is that correct?

A. I am sure I had never seen him before.

Q. Was it during the time he was attempting to assault you or using force on you, that you saw his teeth?

A. No. The first time I noticed his teeth was when he came up to me.

Q. When he was talking?

A. Yes.

Q. At the time you identified the accused in the identification parade, did you see any mark or injury on his hand?

208 A. No.

Q. Do you know what part of his hand—I don't mean the right or left hand—but what part of his hand you hit?

A. It was the fat part of his hand on the inside.

Q. Beneath the base of the thumb, do you think?

A. Yes.

Q. You have told us to the best of your knowledge what time these various incidents took place. Do you have any means of fixing that time or is that just your best estimate of the time?

A. I just guessed at the time.

Q. Do you recall specifically the time that you left—I believe it was Mrs. Kerry's house?

A. Just after half past 10.

Q. Did you see the clock before you left?

A. Yes—because I noticed it was getting late and I should have been in at 10.

Q. You planned to leave at half past 10?

A. No, I planned to leave at half past 9.

Q. You did notice the time specifically before you left the house?

A. Yes.

Q. Or at the time you left the house?

A. Yes.

Q. When you saw the men lined up in the identification parade, did you immediately walk over and place your hand on the accused?

A. No. I was too frightened.

Q. Did you immediately designate him as the one who had attempted to assault you?

A. Yes.

Q. Before you identified him, did you walk down the line and look at them all?

A. No, I saw him first.

Q. Did you smell any whiskey or beer on the breath of the man that assaulted you? Or could you tell about that?

A. No, I couldn't tell.

209 President of Court. Were the black out curtains drawn at this house before you left? Was the black out on before you left the house?

A. I don't remember.

Q. Was the black out—Was it black out time when you got home?

A. Yes; it was a quarter past 11 when I got home.

Q. How do you know that time?

A. My father was waiting up for me.
Q. He remarked on the time, did he?
A. Yes.
PROSECUTION. What do you weigh, Miriam?
A. 8 stone 6.
Q. How many pounds in a stone?
A. 14.
The witness was then excused and withdrew from the room.

WILLIAM FRANK ALBERT, "Bibury", Harwich Road, Lawford, a British civilian, a witness for the Prosecution, was sworn and testified as follows:

Direct Examination

Questions by the PROSECUTION.
Q. What is your name?
A. Frank Albert Welham.
Q. Where do you live?
A. "Bibury", Harwich Road.
Q. Where are you employed?
A. At the B. X. Plastics, Brantham.
Q. Calling your attention to about 11:10 on the evening of 11 July 1944, where were you at that time?
A. Going from Brantham to Manning Tree.
Q. Were you near any house or cottage at this point?
A. Yes—there was a house on the right hand side.
Q. Do you know the name of that cottage?
A. No, sir.
Q. Who was with you?
A. Bombadier Carter.
Q. Where were you going?
A. Home to Lawford.
Q. When you got in the vicinity of the cottage you have described, did anything unusual happen there?
A. Yes. I saw a cycle on the opposite side of the road, i. e. the left hand side.
Q. Did you see anything else?
A. I heard a girl crying.
Q. What did you do?
A. I got off my bike, picked the girl up—I thought she had had an accident.
Q. Did she say anything to you at that time?
A. Yes. I said: "What is the matter?" and she said: "A Yank hit me on the head several times."
Q. What was the appearance of her clothing?

A. She was half in the grass and half in a sitting-lying position. Her clothing was ruffled.

Q. Did you notice anything else about her clothing?

A. No, sir.

Q. What did you do after the girl had spoken to you?

A. I picked her up and tried to console her. She was shaking and in a nervous condition.

Q. Then what happened?

A. We tried to get the girl on her cycle, walked a few yards with her. Then Bombadier Carter carried on into Manning Tree with her.

Q. Was she crying?

A. She was sobbing nearly up to the Railway Tavern. That is where I left her.

Law Member. Do you know the name of the girl?

A. Her name was Callum. I knew the girl.

21P Cross-Examination.

Questions by Defense.

Q. Can you tell us definitely what time it was you saw the girl lying in the grass?

A. I only estimated the time.

Q. How did you estimate it?

A. I knew the time I left Brantham.

Q. What time was that?

A. 10 to 11.

Q. How long did it take you to get there?

A. I would say a few minutes, or five minutes past 11.

Q. Did she tell you the Yank had just left her?

A. Yes.

Q. Did you see the Yank?

A. I saw a Yank between the bridges. Right in the middle of the two bridges.

Q. About 25 yard from where you found the girl?

A. More like 200 yards, I would say.

Q. A journey of about two or three minutes?

A. I would say about 5 minutes.

Examination by the Court.

Law Member. Is your name Welham?

A. Yes, sir.

Q. Did the girl give you a description of the man who attempted to assault her?

A. None at all, sir.

CARTER, CECIL, Corporal, Bombadier, Stockbort, Cheshire, England, a British soldier, a witness for the Prosecution, was sworn and testified as follows:

Direct Examination.

Questions by PROSECUTION.

Q. What is your name?

A. Cpl. Bombadier Carter—Cecil Carter.

Q. Where do you live?

212 Q. Where are you now stationed?

A. Manning Tree.

Q. Calling your attention now to approximately 11 o'clock in the evening on July 14th, where were you at that time?

A. Cycling along the road from Brantham on the way to Manning Tree.

Q. Who was with you?

A. Mr. Welham.

Q. Are there any houses along that roadway?

A. There is a house on the road.

Q. Do you know the name of that house?

A. No, sir.

Q. Are there any other houses in the vicinity nearby?

A. No, sir.

Q. As you reached that house, or somewhere in that vicinity, did anything unusual occur?

A. Well we were cycling along the road and found this young lady on the roadside.

Q. Where was she on the roadside?

A. Approximately opposite the house that stands on the right hand side.

Q. What was her condition?

A. She was nervous and shaking.

Q. Did you see her clothes?

A. No, sir.

Q. Was she crying?

A. Yes.

Q. Did she say anything to you at that time?

A. The only words I can recall her saying was: "I have been attacked by a Yank."

Q. Before you saw the young lady did anyone pass you going toward Brantham on the way you were traveling?

travelling

eN A. There were some ~~passengers~~ in the opposite direction.

Q. Do you know who that was?

A. Actually three passed us. Two American soldiers and one American soldier cycling on his own.

213 Q. Who passed you first?

A. The two American soldiers.

Q. About how much time elapsed between the time the two Americans passed you and the other single American passed you?

A. I should say a matter of 3 or 4 minutes.

Q. Where was it the one American passed you? Where were you?

A. On the road from Brantham to Manning Tree. Just past the place they call the white bridge.

Q. How long was it after that you saw the young lady?

A. A matter of a minute or so.

Q. You were in the company of Mr. Welham at that time?

A. Yes, sir.

Q. What did you do regarding the young lady?

A. We didn't know it was a young lady at the time. We were passing along the road and heard somebody sobbing and turned back. We wanted to know what was the matter, we picked the young lady up. She was sobbing and she told me she had been attacked by a Yank. We tried to console her the best we could. We got her on to her cycle and saw the young lady home safely.

Q. Did you take the young lady home?

A. Yes.

Q. At what time did you arrive at her home?

A. I would say roughly a quarter past 11.

Q. Do you know where the short cut is to Manning Tree on the bridge?

A. Yes, sir.

Q. Was it on the Brantham side or the Manning Tree side these two Americans passed you?

A. The Brantham side.

Examination by the Court.

Law Member. Did the young lady give you a description of the man who attacked her?

A. No, sir. It was getting dark at the time.

Q. When you arrived home, did she give you a description of the man who attacked her?

A. No, sir.

Q. Could you identify, or name the American soldier you saw that night around 11 o'clock?

A. No, sir.

Q. Was it dark?

214 A. It was getting dusk.

President of Court. Did you have your bicycle light turned on?

A. No, sir. I haven't got a light.

Q. Did the other bicycles that passed you have lights on?

A. I can't remember, sir.

Q. Did your friend have his lights on?

A. I couldn't tell you.

CULLUM, HERBERT ARTHUR, 57 Colchester Road, Lawford, a British civilian, a witness for the Prosecution, was sworn and testified as follows:

Direct Examination.

Questions by PROSECUTION.

Q. What is your name?

A. Herbert Arthur Cullum.

Q. Where do you live?

A. Lawford.

Q. You are the father of Miriam Cullum?

A. I am.

Q. Calling your attention to the approximate time of about 11 o'clock on the evening of 11 July 1944, did you see your daughter at that time?

A. I should say it was 10 past 11.

Q. Where did you see your daughter?

A. I heard her coming indoors and I was coming downstairs to meet her. I had been waiting for her.

Q. When you saw her, what was the condition of her clothing? A. I didn't take much notice of her clothing, to tell the truth. She was crying.

Q. Did she say anything to you at that time?

DEFENSE. Objected to as incompetent. It doesn't form part of the *res gestae* and certainly there was a long interval of time between the time of the alleged act and this time.

LAW MEMBER. Objection sustained.

PROSECUTION. If the witness were allowed to answer the question, he would testify that his daughter, Miriam Cullum told him she had been attacked by a Yank and would enumerate the facts of the attack as told to him by his daughter.

215 PROSECUTION. The next day after the 11th of July, did you notice any marks on your daughter's person?

A. Only on her neck.

This portion made outside the hearing of the court 11 Jan 45 JPG

Q. What did you see?

A. Bruises on her neck and they were swollen.

Q. Did you examine her legs?

A. No.

Q. At some later date did you look at her legs?

A. She did show them to me a day or two after.

Q. When she showed her legs to you, what if anything did you see?

A. There were bruises on her legs.

Q. Could you tell the court where the bruises were?

A. On the top (indicating somewhere between the knee and ankle).

Q. Do you remember the color of the bruises?

A. I should say they were blue—I should think.

Q. They weren't yellow?

A. No.

Q. How long did the swelling around her neck remain, to your knowledge?

A. Several days.

Q. Did you see your daughter's neck when she left home on 11th of July?

A. I didn't take notice.

Q. Do you know whether or not her neck was swollen before?

A. No.

DEFENSE. Objected to. He said he didn't take notice. I ask that the answer be stricken and the court instructed to disregard it.

LAW MEMBER. The court will be so instructed.

LAW MEMBER. Will Mr. Cullum be further called as a witness?

DEFENCE and PROSECUTION. No.

LAW MEMBER. (*To Mr. Cullum*) If you would like to, you may take a seat in the court room and listen to the rest of the proceedings.

The witness was then excused and took a seat in the court room.

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216 GOODALL, BETTY, of No. 45, Peel Road, Wembley, a civilian, a witness for the Prosecution, was sworn and testified as follows:

Direct Examination.

Questions by PROSECUTION:

Q. What is your name?

A. Betty Goodall.

Q. How old are you?
A. 16.
Q. Where do you live?
A. 45, Peel Road, Wembley.
Q. On the 11th of July 1944, where were you staying at that time, Betty?
A. Marsh Cottage.
Q. Where is the Marsh Cottage?
A. At Lawford, near Manning Tree.
Q. It is on the road from Brantham to Manning Tree?
A. Yes.
Q. Which side of the road going toward Manning Tree is the cottage located?
A. On the right.
Q. Are there any other houses around there?
A. No.
Q. What time did you go to bed that evening?
A. About half past 10.
Q. From half past 10 to 11 o'clock what did you do?
A. I was reading.
Q. At about 11 o'clock did you hear anything?
DEFENSE. Objected to. At this time I should like to object to the testimony of this witness—what she would testify to—on the ground there is no proof—anything she heard may have come from six different sources other than the alleged scene of the crime.
LAW MEMBER. That is a matter which concerns its probative force and for that reason objection is not sustained.
WITNESS. I heard a scream about that time.
217 Q. How many screams did you hear?
A. Two.
Q. From where did the screams seem to come?
A. They seemed to come from the walls.
Q. Where are the walls?
A. On the front of the house.
Q. Which way does the front of your house face?
A. Toward the roadway.
Q. About how far did the screams seem to be?
A. In the distance.

Cross Examination.

Questions by DEFENSE.
Q. Betty, to whom did you first make this statement?
A. I think it was Police Constable Felton.
Q. Did he come to see you?
A. Yes. I met him down at Manning Tree.

Q. He sent for you?

A. I just met him.

Q. What did he say to you and you to him?

A. He asked me if I was the girl from Marsh Cottage? I said: "Yes." He asked me if I had heard anything.

Q. Did he tell you you heard two screams?

A. No, he didn't. He just asked me if I heard anything.

Q. How did you know this was the night of the 11th? When did you meet him?

A. Two days afterwards.

Q. Did he ask you whether or not you heard screams two nights before?

A. Yes, on the 11th.

Q. Did he tell you where the screams came from?

A. No. He just asked me if I heard anything.

Q. Was anybody else at home with you at that time?

A. My mother, grandmother and Uncle Ted.

Q. Did your mother hear any screams?

A. No.

218. Q. Did your grandmother?

A. No.

Q. Did your Uncle Ted hear any screams?

A. No.

Q. When you heard the screams did you call for your mother?

A. I called Mother and she said it was probably somebody coming home from the dance.

Q. What did it sound like—like somebody having a gay party?

A. No; it just sounded ordinary.

Q. Did it sound frightened?

A. No.

Q. You just heard a loud shout?

A. It was a scream.

Q. Like boys coming home drunk will shout?

A. It was just an ordinary scream.

Q. It didn't have any fright to it?

PROSECUTION. I object. He is asking for a conclusion on the part of the witness.

LAW MEMBER. That is a matter of common observation. That is all right. Objection overruled.

DEFENSE. Did it appear to you the one who shouted was frightened?

PROSECUTION. Object to that. How can she tell?

LAW MEMBER. I think this is relevant. Don't let the lawyers give you an opinion you didn't have before.

DEFENSE. You remember testifying you said there was no fright to it?

A. Yes.

Q. You still say that?

A. Yes.

Examination by the Court.

President of Court. Was the scream—was it a woman's voice or a man's?

A. A woman's I should think.

Q. How do you judge that? Was it high or low tone?

219 A. I was lying in bed and reading a murder book and didn't take any notice of it.

LAW MEMBER. What time did you hear the two screams?

A. About 11 o'clock.

Q. Did one follow quite closely to the other?

A. Yes.

DEFENSE. You say you were reading a murder mystery?

A. Yes.

Q. Could it have been you didn't hear screams at all and it was part of the book?

A. No.

Q. You are not really sure, are you?

A. I really think they were screams.

Q. You are not too sure?

PROSECUTION. I object. She has answered him twice.

LAW MEMBER. Yes, she has answered the question.

Member of Court. Betty, is it pretty noisy on that road at 11 o'clock from soldiers coming back from Manning Tree or is it fairly quiet?

A. It is not noisy. Just ordinary.

Q. These screams are something that stuck in your mind? It is not something that happens once a week or oftener that you hear this kind of a noise? I know a lot of soldiers go back and forth, but I want you to tell me, is it unusual for you to hear a noise like this at night—these screams?

A. You often hear people shouting around there.

LAW MEMBER. Betty, how do you fix the time at 11 o'clock?

A. I had been in bed about half an hour. We had no clock in the room.

Q. You know you went to bed at 10:30?

A. Yes.

Q. You looked at the clock?

A. Yes.

Q. 11 o'clock is just an estimate between the interval you went to bed and the time you heard the screams?

A. Yes

220 FELTON, WILFRED JOHN, police constable, Mistley, Essex, a witness for the Prosecution, was sworn and testified as follows:

Direct Examination.

Questions by Prosecution.

Q. What is your name?

A. Wilfred John Felton.

Q. What is your business?

A. Police constable, Essex Constabulary.

Q. Where are you stationed?

A. Mistley.

Q. Calling your attention to the 12th of July 1944, did you make a certain investigation at that time?

A. I did, sir.

Q. I hand you what has been marked Prosecution's Exhibit 1 and ask if you can identify Prosecution's Exhibit 1.

A. Yes.

Q. What is it?

A. The skirt I obtained from the witness Dale.

Q. What is the witness Dale's first name?

A. Sheila Winifred.

Q. I hand you now what has been marked Prosecution's Exhibit #2. Can you identify it?

A. I can.

Q. What is it?

A. A pair of knickers I also obtained from the witness Dale.

Q. That is the witness Dale you referred to?

A. Yes.

Q. Where did you obtain the exhibit?

A. From Dr. Beckett at Manning Tree.

Q. Who was present?

A. I am not sure whether Dr. Beckett had left or not, but I had been there and I asked Miss Dale to go home and fetch the clothing.

221 Q. On the afternoon of that day, did you make a further investigation?

A. I did, sir.

Q. Where did you go?

A. To the Ipswitch Road, Lawford.

Q. At what point did you go?

A. To a point 10 feet on the Suffolk side of a telegraph pole—A-29—and 6 feet on to the grass verge.

Q. Did you see anything at that point?

A. I did.

DEFENSE. Objected to on the ground that they are going to attempt to prove a state of affairs on the date of the investigation. There is no presumption that the condition, as they found it then, was the same as after the alleged crime. I ask in the absence of proof that the condition remained the same—that a guard was posted to keep it remaining the same—that no evidence be received now where the witness will testify how it was a day later.

LAW MEMBER. Objection overruled.

PROSECUTION. What did you see?

WITNESS. I saw where the grass and some tall weeds had been broken down as if some person had been lying there.

Q. At which side of the road, going toward Manning Tree, was this area?

A. On the right side of the road. Going toward Manning Tree it would be the left hand side.

Q. Are there any houses here?

A. One only.

Q. What house?

A. Marsh Cottage. It is about 100 yards away, on the opposite side of the road.

Q. What is the condition of the surrounding country?

A. Very open.

Q. Are there any other houses around there?

A. None nearer than the Manning Tree railway station.

Q. The station is approximately how far from this spot you saw on the road?

A. 250 to 300 yards.

Q. On the 17 of July 1944 did you see a person known as Miriam Florence Cullum?

A. I did.

Q. Where did you see her?

222 A. At her residence.

Q. Did you see any portion of her body?

A. Only that which was visible to me.

Q. Did you notice anything about that portion which was visible?

A. I noticed the right side of her neck was swollen.

Q. Did you see any other marks on her person?

A. No, sir.

LAW MEMBER. What day was that?

A. Monday, the 17th.

LAW MEMBER. Was that the first time you saw her?

A. Yes.

PROSECUTION. Did you on the 12th of July see a person known as Sheila Dale?

A. Yes, sir.

Q. Did you examine any portion of her body?

A. I didn't examine her but I was shown some bruises when in surgery.

Q. Where were those bruises located?

A. On the thighs.

Q. Did you see any other marks on the body of Sheila Dale?

A. No, sir.

Q. On the 18th of July did you come to the station here?

A. I did, sir.

Q. Did you see the accused at that time—Private Smith?

A. I did, sir.

Q. Do you see the accused in this room now?

A. Yes, sir.

Q. Where is he seated?

The witness indicated the accused.

Q. At that time did you examine any portion of the accused's person?

A. I asked him to show me his hands.

Q. What did he do?

A. On the ball of the left thumb there was a wound scab.

223 Q. Could you indicate to the court where that was?

The witness indicated the fat part of the left thumb.

Q. Did you see any other marks on the person of the accused, Smith?

A. No, sir.

DEFENSE. I should like to move to strike out the question as to "Did you see any wound on his hand" also the response, unless a proper predicate is laid. That is certainly incriminating and before a defendant may be called upon to incriminate himself, he must be advised as to his rights.

PROSECUTION. He can tell what he saw.

LAW MEMBER. (To Defense) Your theory about the law is stretching it.

DEFENSE. The defendant was forced to show his hands.

LAW MEMBER. Was he forced to show his hands?

DEFENSE. He asked to see them.

WITNESS.

H I M N D P G. ~~LAW MEMBER~~. No force was used.

DEFENSE. (To witness) When you say you didn't force him, you mean you didn't twist his arm.

WITNESS. Correct, sir.

DEFENSE. But you did say: "Show me your hands."

A. I did.

Q. You didn't give him any opportunity to refuse to show them.

A. He never refused.

Q. You said: "Show me your hands."

A. I did.

Q. Did you advise him of having committed a serious offense?

A. I did not.

Q. Did you tell him what the penalty was?

A. I did not.

LAW MEMBER. Was he suspected of a serious offense at that time?

WITNESS. Not at that time, sir.

LAW MEMBER. Objection overruled.

PROSECUTION. On the 18th of July 1944 were you present when an identification parade was held?

A. I was.

224 Q. Where was it held?

A. At this base.

Q. Did you see the person known as Sheila Dale there?

A. I did.

Q. What, if anything, did you see the person known as Sheila Dale do at the time the identity parade was held?

A. I walked with her along the road and she picked out Smith as the man who assaulted—

DEFENSE. I object to that and to the answer. The question was "What did you see her do." The statement that she picked out the man who assaulted her is hearsay and nothing more and there is no theory to sustain it otherwise.

LAW MEMBER. The purpose of the identification parade was to pick out a man whom she had said had assaulted her and for that purpose, I think it is competent and the objection is overruled. The court is instructed there is no proof that the young lady was assaulted by anyone, but merely that she picked him out as having assaulted her. Objection is overruled.

PROSECUTION. At that time, did you see the person known as Miriam Florence Cullum there?

A. I did.

Q. At the time you accompanied the person known as Sheila Dale, when she identified the accused, was the person known as Miriam Florence ~~Dale~~ Cullum present?

J McN P G

A. No, sir.

Q. Do you know where she was? A. Yes, sir.
Q. Where was she?
A. In Lt. Todd's office.
Q. Where is Lt. Todd's office located with relation to where the identification parade held?
A. It was to the right of the Leftenant's office. Outside the building and to the right.
Q. Do you know whether or not from the office of Lt. Todd anyone could see the soldiers lined up in the parade?
A. No, sir; they could not.
Q. How do you know?
A. You can't see out of the window—not at the bottom.
225 Q. How many men were lined up in the parade?
A. 16 altogether.
Q. Do you remember how they were dressed?
A. Yes, sir.
Q. How were they dressed?
A. Their trousers, with their hats under the lapels—
Q. Do you remember the color of the hair of the various men in the identification parade?
A. I couldn't see the color of all of them.
Q. Were they all brunettes or some blonds?
DEFENSE. I ask that Prosecution not lead this witness.
LAW MEMBER. Objection sustained.
PROSECUTION. Can you tell the court the type of hair on several of the men?
A. Fair and dark.
Q. How would you describe the accused's hair?
A. Fair, inclined to be dark.
Q. At a later time did you see the person known as Sheila Dale at the time of the parade?
A. Yes, sir.
Q. After the person known as Miriam Florence Cullum identified the accused where did she go?
A. She went back to Lt. Todd's office.
Q. Did the person known as Sheila Dale then come out?
A. Yes, sir.
Q. At what time did Sheila Dale come out. How soon after the person known as Miriam Cullum had identified the accused?
A. Only a minute or so.
Q. Do you know whether both Sheila Dale and Miriam Florence Cullum passed each other outside as they were going to and from the identification parade?
A. I can't say that, sir.

Q. What, if anything, did you see the person known as Sheila Dale do regarding the parade?

A. She walked along the row of soldiers and picked out a man out.

226 Q. Whom did she pick out?

A. The man now accused.

Q. Who is that?

A. That man there.

Q. Do you know his name?

MCM G A. Yes; that is Smith. (Indicating the accused)

DEFENSE. Defense does not desire to ask any questions but renews his motion that all this testimony of this witness, in regards to the identification parade be stricken on the grounds that it is incompetent.

LAW MEMBER. Overruled.

PROSECUTION. Constable Felton, were you present before the men were lined up—before they were in line?

A. Yes, I was here some time before they were lined up.

Q. Were you present at the time the accused, Smith, came upon the scene where the identification parade was to be held?

A. I was standing outside towards the office when he came out.

Q. Do you know whether or not the accused, Smith, was told to go to a certain spot, or what the circumstances were as to his being placed in the identification line?

A. I don't know.

DEFENSE. Defense desires to state for the purposes of the record, it will not cross examine the witness on the matters before stated for the reason that it would be prejudicial to our position.

LAW MEMBER. As you may elicit anything from this witness by cross examination, you are taking a chance you are not called upon to take, because the cross examination of a witness by incompetent questions which have been ruled competent does not change your position. If it is incompetent, your cross examination would not prejudice you in any way.

PROSECUTION. I think we should inquire of the accused whether he desires to cross examine the witness.

ACCUSED. No.

LAW MEMBER. Private Smith, your counsel has objected to certain parts of the examination and answers of Constable Felton. His objections have been overruled—that is some of them have. He has refused to cross examine

the witness, as the court understands it, on the theory
227 that he might diminish the force of his objections or possibly eliminate them. It is very distinctly the court's ruling and the court's idea of the law, so stated for the purpose of the record, that to obtain the benefit of his objections, it is not necessary for the counsel for the Defense to forego examination with regards to matters objected to and that examination may be made without diminishing or without in any way waiving any objection that has been made. Do you care to examine this witness yourself?

ACCUSED. I will abide by the ruling of my counsel.

PROSECUTION. Constable Felton, did you at any time give Prosecution's Exhibits 1 and 2 to anyone?

A. I did.

Q. To whom?

A. To Detective Constable Chaplin.

Q. About what time did you give him Prosecution's Exhibits 1 and 2?

A. The same day I received them.

Q. They never were out of your possession except then?

A. No.

EXAMINATION BY THE COURT.

LAW MEMBER. You say you never talked to Miriam Cullum until the 17th of July?

A. Right, sir.

Q. Had there been any complaint made by her or in her behalf of any matter that happened on the 11th of July—before the 17th of July?

A. Yes, sir.

Q. When was the matter of her complaint brought to the attention of the police?

A. The previous day—on Sunday.

Q. That was the 16th?

A. Yes, sir.

Q. That was the first time a complaint had been made?

A. Yes, sir. But at that time she declined to say to the constable on duty the actual words or what she alleged had been said to her by this man.

Q. That was on the 16th?

A. Yes, sir. When I interviewed her I asked her the words.

Q. You lodged a complaint on her behalf?

A. She came to the police station by herself.

Q. Accompanied by her parents?

A. That I don't know.

228 Q. When you first questioned the accused, what circumstances led you to question Private Smith?

A. That day a number of men were interviewed in Lt. Todd's office and Smith was one of them.

Q. Were substantially the same questions asked all of the men interviewed?

A. Yes, sir—their movements the previous week.

Q. What was the first day you interviewed Pvt. Smith?

A. The first I actually saw Smith was on Thursday, the 13th. I did not speak to him on that day.

Q. When was the first day you spoke to him?

A. I first spoke to him on Tuesday the 18th.

Q. Was that when you noticed the scab on the base of his thumb?

A. Yes, sir.

Q. That was after both Miss Cullum and Miss Dale had identified him?

A. No, sir; it was before.

Q. But on the same day?

A. Yes, sir.

Q. You say you saw Pvt. Smith on the previous day. How did you happen to see him, or was he pointed out to you?

A. He was pointed out while in a public house in Brantham, and I was in there.

Q. When you saw him, it was not in connection with the investigation of the matters in this case? You first spoke to him about the matters involved in this case on the 18th?

A. Yes, sir.

Q. What time on the 18th of July did you first talk to Pvt. Smith? At that time had the identification parade been arranged?

A. No, sir.

Q. As a result of your talk with Pvt. Smith and certain marks you saw upon his person, was the identification parade then arranged?

A. Yes, sir.

Q. At approximately what time was the indentification parade held?

A. Approximately 7:15 P. M.

Q. Was it broad daylight?

229 A. Yes, sir.

Q. You had questioned both Miss Dale and Miss Cullum previous to the identification parade?

A. Yes, sir.

Q. Had both of them given you descriptions of the men who they said had mistreated them or attempted to mistreat them on the 11th of July?

A. Yes, sir.

PROSECUTION. I don't think he understands you.

LAW MEMBER. I meant at some time prior to the 18th did they give him descriptions of the man whom they said had mistreated them on July 11th?

WITNESS. Yes.

LAW MEMBER. Were they both present at the time they gave the description of the man they said mistreated them?

A. No, sir.

Q. On what date did Miss Dale first give you a description of the man she said mistreated her on July 11th?

A. On July 12th, sir.

Q. On what day did Miss Cullum give you a description?

A. On July 17th, sir.

Q. Did you examine or look at the teeth of this accused?

A. No, sir; I did not.

Q. Did you make any request that he open his mouth and show his teeth to you?

A. No, sir; I did not make that request.

Q. The scab wound you found at the base of his thumb on his left hand—was that an incised wound or an abrased wound?

A. It was not that which could be made by the clean cut of a knife. He gave an explanation of that and said it had been made by a cleaver.

DEFENSE. I ask that be stricken.

LAW MEMBER. I think that is competent unless you have some good reason for objecting. Overruled.

LAW MEMBER. Did whatever instrument or instrumentality which caused the wound penetrate the flesh, as opposed to more or less scraping the flesh?

A. It had penetrated.

Q. In other words, whatever caused the wound had made a penetrating wound?

A. Yes, sir.

230 Q. That is opposed to a mere abrasion?

A. Yes, sir.

Q. Who picked the men to stand in the identification parade?

A. The American authorities.

Q. I believe you stated you first talked to Pvt. Smith on the morning of the 18th of July?

A. No, sir, not the morning.
Q. The afternoon?
A. Yes, sir.
Q. About 3:30?
A. About that time.
Q. How many men were brought before you about that time for you to talk to?
A. I actually came over here around about 11 I should say, and anything up to 8 or 9 men had been before us.
Q. Did you interview the men between 11 in the morning and 3:30?
A. A number of them.
Q. Approximately how many?
A. I should say 9 but should not like to be definite.
Q. Were you looking for a man with any particular marks of identification on him?
A. Yes, sir.
Q. What marks of identification were you looking for?
DEFENSE. I object to that as the only marks is the description he got from these two girls and the testimony would be incompetent.
LAW MEMBER. We will strike that. Do you happen to know how the men interviewed by you on the 18th of July were selected for the interview?
A. I do not know, sir.
President of the COURT. Did you call for individuals by name when you were interviewing them?
A. Only one, sir.
Q. Was that Smith?
A. No, sir.
Q. Did you ask to be allowed to interview men with certain physical characteristics, a certain appearance, etc.?
2311 A. Yes, sir.

The witness was then excused and withdrew from the room.

CHAPLIN, LEONARD HERBERT, Detective Constable, Harwich, Essex, a witness for the Prosecution, was sworn and testified as follows:

Direct Examination.

Questions by PROSECUTION.

Q. What is your name?
A. Leonard Herbert Chaplin.
Q. What is your business?

A. Detective constable.

Q. Where are you stationed?

A. Harwich, Essex, about 18 miles from here.

Q. Calling your attention to what has been marked Prosecution's Exhibit 1 did you at any time see Prosecution's Exhibit 1?

A. Yes.

Q. Where.

A. I took possession of that at Mistley police Station from Constable Felton.

Q. I hand you what has been marked Prosecution's Exhibit 2. Did you see Prosecution's Exhibit 2 at any time?

A. Yes. It was the same time and place I took possession of that.

Q. What did you proceed to do with Prosecution's Exhibits 1 and 2?

A. I conveyed them to the Harwich Police Station where they were locked in the C.I.D. office. On the 17th of July I forwarded those two articles by registered post to Dr. Davidson, of the Metropolitan Police Laboratory, Hendley.

Q. Were these articles of clothing given to anyone else other than yourself from the time you first took possession of them?

A. Not at all.

The witness was then excused and withdrew from the room.

232 WAKELY, HARRISON J., Pfc. 1260th MP Company, AAF Station F-157, a witness for the Prosecution, was sworn and testified as follows:

Direct Examination.

Questions by PROSECUTION.

Q. State your name, grade, organization and station.

A. Pfc. Harrison J. Wakely, 1260th MP Company Station F-157.

Q. Do you know the accused in this case?

A. By sight, sir.

Q. Can you identify him here in the court room?

The witness identified the accused.

Q. Is he in the military service of the United States to your knowledge?

A. Yes, sir.

Q. Calling your attention to the evening of July 11th, 1944, at about 1800 hours, where were you at that time?

A. Going on duty, sir.

Q. Where were you on duty?

A. Post 2.
Q. Post 2 where?
A. Down by the church.
Q. That is on this station?
A. Yes, sir.
Q. What was your tour of duty on 11 July 1944?
A. From 1800 to 2400.
Q. Was there anyone else there on the gate as sentry? Other than yourself?
A. No, sir.
Q. You were posted there as sentry?
A. Yes, sir.
Q. What are your duties as a sentry?
A. To check the passes of boys going out and coming in.
Q. When you check the passes of the boys coming back in, what do you check them for?
A. Just check the passes; that's all.
223 Q. That evening do you remember seeing the accused?
A. Yes, sir.
Q. About what time was it you saw the accused?
A. About 11:45.
Q. How do you fix that time?
A. It was just before the relief came around.
Q. You are relieved when?
A. We are supposed to be relieved at 12 o'clock.
Q. How do you know it was the accused you saw about 11:45?
A. He came in with one of our boys.
Q. Do you remember who that was?
A. Partyka.
Q. How soon after that did you go off duty approximately?
A. About 20 minutes.

Cross Examinaton.

Questions by Defense.

Private Wakley, do you remember having a conversation with me last evening?
A. Yes, sir.
Q. Who was present?
A. Smith and Lt. Crollard were present.
Q. Was Lt. Lieberman present?
A. Yes, sir.
Q. Do you remember talking to us about what time the defendant came on to the base on July 11th?
A. Yes, sir.

Q. Do you remember your telling us you were relieved at 11:50, or 10 minutes to 12 and fully 20 minutes before you were relieved, this boy came in?

A. Yes, sir. It was between 11:30 and 11:45.

Q. You told us it was nearer 11:30. Since then has your recollection been refreshed?

A. No, sir.

Q. Have you had an opportunity to speak with the Trial Judge Advocate at any time?

234 A. No, sir.

PROSECUTION. I think for the purpose of the record I might say I saw him yesterday.

DEFENSE. Didn't you tell us it might have been between 11:15 and 11:30 this boy came in?

A. No, sir. I said between 11:30 and 11:45.

Q. Didn't we say Partyka said he came in between 11:15 and 11:30 and didn't you say then that he may be right?

A. No, sir.

Q. Did you have a watch with you when you were on duty the night of July 11th?

A. Yes, but I didn't look at it.

Q. You do know you were relieved about 10 minutes to 12?

A. Yes, sir.

Q. Are you sure how many minutes it was before you were relieved that these boys came in?

A. I couldn't say for sure.

Q. It may have been 20 minutes or a half hour?

A. I think it is nearer 20 minutes than a half hour.

Q. But it may have been a half hour?

A. Yes, sir.

Examination by the COURT.

LAW MEMBER. How do you fix 11:50 as the time you were relieved on July 11th?

A. The relief was early that night.

Q. Did you look at your watch?

A. Yes, it was about 10 minutes of.

Q. Did you leave the post right then and go to your quarters?

A. Yes, sir.

Q. You don't put down a time when a man comes in on this post?

A. No, sir.

Q. You don't put down a time when he goes off?

A. No, sir.

235 Q. You just look at his pass to see whether he is reporting back at the time fixed on his pass?

A. Yes, sir.

Member of Court: At that particular post, isn't there a clock that rings chimes at 15 minute intervals?

A. No, sir. It only rings on the hour.

Q. Did you hear the clock at 12?

A. No, sir.

Q. Did you hear it at 11 o'clock?

A. Yes, sir.

Law Member. How far is the post at which you were stationed from these two bridges referred to in the trial?

Defense. Sir, we are going down there later this afternoon to take the reading of the speedometer, etc.

The witness was then excused and withdrew from the room.

Prosecution. At this time I desire to read for the benefit of the court an excerpt from Military Justice Circular No. 3, Branch Office of The Judge Advocate General, dated 11 March 1944, as to Paragraph 4 thereof:

View of the Premises.

Following is an extract from B R Opinion (ETO 611: Porter)

"The practice of 'viewing the premises' by a military court is authorized procedure (AW 31). However, the practice of receiving testimony and examining witnesses at a 'view of the premises' is almost universally condemned and usually is reversable error. (Underhill's Criminal Evidence, p. 833, sec. 410, note 49; 16 CJ, p. 827, sec. 2092, note 9; 23 CJS, p. 234, sec. 986, note 52). A 'view of the premises' properly conducted and not coupled with examination of witnesses may in many instances be extremely helpful and informatory to the courts. When in addition, the court either permits or directs an examination of a witness at the scene of the event it is indulging in a highly dangerous practice, which is not approved or commended."

At this time, before the Prosecution rests, I ask that the court be transported to the scene where the alleged offenses are said to have been committed, so they will have an opportunity to observe the scene.

Defense. The Defense joins in that plea.

MCN The court then at 5:05 P. M. ~~recessed until 7:30 P. M. during which time~~ the personnel of the court, the prosecution and the defense, the accused and the reporter went to MCN the scene of the alleged crime *after which the court recessed until 7:30 P. M.*

At 7:30 P. M., the personnel of the court, the prosecution and the defense, the accused and the reporter resumed their seats in the court room.

236 PROSECUTION. The Prosecution rests.

DEFENSE. The Defense does not desire to make any motion at this time and calls as its first witness Bernard W. Smith, the accused.

LAW MEMBER. Private Smith, you have the right to do one or more of several things. First, you may remain silent and say nothing at all and the court will not presume you are in any way guilty merely because you remained silent. Second, you may make an unsworn statement, either written or oral, or by your counsel, about any or all of the matters touched on in this trial. Third, you may take the stand like any other witness and testify in your own behalf. In case you do take the stand, the Trial Judge Advocate may cross examine you not only in matters covered in direct examination but on collateral matters, to test and impeach your credibility. The cross examination by the Trial Judge Advocate may cover any fact relative to the issue of your guilt or innocence or relative to your credibility as a witness. You cannot avail yourself of your privilege against self-incrimination to escape proper cross-examination and if you have any prior military or civil convictions you may be questioned regarding those convictions to test your credibility. Do you thoroughly understand the explanation I have just given you?

ACCUSED. I do, sir.

DEFENSE. When you make reference to prior civil and military convictions, with reference to the military, it is my understanding the Prosecution is limited to crimes which occurred one year immediately previous to the crime alleged here. Secondly, with reference to civilian convictions, you are limited to those crimes which go to his credibility?

PROSECUTION. That is right.

LAW MEMBER. Private Smith, it is your desire to be sworn and take the stand in your own behalf?

ACCUSED. Yes.

SMITH, BERNARD W., Private, Hq Det, 353rd Fighter Group, the accused, was then sworn and testified as follows:

Direct Examination.

Questions by PROSECUTION.

Q. What is your name, grade, organization and station?

A. Private Bernard W. Smith, 353rd Fighter Group, AAF Station F-157.

Q. Are you the accused in this case?
A. Yes, sir.

Questions by DEFENSE.

Q. Private Smith, I direct your attention to the night of July 11, 1944. Where were you at about 7 or 7:30 that evening?

227 A. At 7 o'clock that evening sir, I was in the 351st Mess Hall.

Q. And after you ate what did you do?
A. I was on duty that night. I went off duty at 7 o'clock.
Q. What did you do then?
A. I left the Mess Hall, cleaned up and went out about 7:30.
Q. Where did you go to?
A. I went out of Post 2 to East Bergholt.
Q. What time did you reach East Bergholt?
A. Close to 8 o'clock.
Q. When you arrived at East Bergholt what did you do?
A. I was looking for a drink and rode around to a couple of different pubs.
Q. How long did you ride around?
A. I would say I was in East Bergholt from 45 minutes to an hour.
Q. What did you do then?
A. I couldn't find any light beer over there so I went down to Brantham.
Q. How far is E. Bergholt from Brantham?
A. About 1¼ miles from the Red Lion.
Q. Where were you going to in Brantham?
A. To the Bucks Horns Inn.
Q. What time did you arrive at the Bucks Horns Inn?
A. Close to 9 o'clock.
Q. What did you do then?
A. I went in there and had a drink.
Q. How much did you drink?
A. One glass of beer. The place was pretty crowded and they ran out of bottled beer and I went up to one or two other pubs.
Q. Where did you go then?
A. A pub called "The Ark."
Q. When was that?
A. In the neighborhood of 8 o'clock.
Q. What time did you leave The Ark?
A. 10 minutes after 9 or 9:15.

Q. How long did you stay at the Ark?

A. I believe I had two drinks at the Ark. I was in there anywhere from 15 to 20 minutes.

Q. Up until that point you had had 3 drinks?

A. Yes, sir.

Q. In each instance what did you drink?

A. Beer.

Q. About what time was it when you left the Ark?

A. Around 9:20 or 9:30.

Q. Where did you go?

A. There is a place in Brantham called the Club. I went to see if I could get a drink of liquor. I went there and all they had was beer. I had a drink of beer in there.

Q. How long did you stay there?

A. I was there about 15 or 20 minutes—long enough to drink a pint.

Q. Where did you go then?

A. Back to the Ark.

Q. What time did you reach the Ark?

A. It was about a quarter to 10.

Q. How long did you stay there?

A. Until closing time, which is 10:30 in that pub. They called time at 10:30 and it was about 10:40 before I left. I came back to the base then.

Q. From that point, how far distant is it back to this base?

A. I would say in the neighborhood of five miles.

Q. How far is it from the scene of the alleged crime you saw today to the Ark?

A. ¾ of a mile to a mile.

DEFENSE. At this time Defense calls upon the Prosecution to stipulate that from the scene of the alleged crime to this base A-157, it is approximately 5 miles.

PROSECUTION. It is five miles; not approximately.

DEFENSE. It is five miles.

LAW MEMBER. Private Smith, is it your desire to stipulate to the effect that it is five miles from Gate 2 to the scene of the alleged crime. That is the second alleged crime, in which the Dale girl was involved?

239 ACCUSED. Yes, sir.

DEFENSE. That means there were how many miles from the Ark to the base here?

ACCUSED. Between 4½ and 5 miles.

DEFENSE. You started back?

A. Yes, sir.

Q. What happened?

A. I left the Ark and went down to the corner and [illegible] toward E. Bergholt. I got up the first real steep hill on the way to Bergholt about half way between Brantham and East Bergholt.

Q. About how far out of Brantham?

A. ½ mile. I got off my cycle to walk. In about 30 seconds to a minute another soldier came up behind me.

Q. Did you recognize that soldier?

A. Yes, sir. I recognized him as a member of the Military Police but not by name.

Q. About what time was it you think he overtook you?

A. Around a quarter to 11 and 10 minutes of 11.

Q. You were then how far from this base?

A. About 4 miles. I wouldn't want to make that definite.

DEFENSE. I ask the court at this time to take judicial notice of the fact that the terrain from this base to the scene of the alleged crime is an extremely hilly one. We traveled it ourselves this afternoon in automobiles. It is just one series of hills.

LAW MEMBER. Having been given an opportunity to visit the scene of the crime, the court will take judicial notice of the terrain between here and the scene of the crime.

Partyka

J J McN P C DEFENSE. You started back with ~~Sgt. Pelletier~~ at 10 to 11?

Leading.

J J McN P C PROSECUTION. Objection. ~~No evidence.~~

DEFENSE. I withdraw that. Did you subsequently determine who that M. P. was?

A. I didn't know him by name that evening.

Q. Did you find out after that evening what his name was?

A. Yes, sir.

Q. What is his name?

A. I found out that evening what his name was, when we came thru 2 Gate. The M. P. called his name.

240 Q. What was his name?

Partyka

J J McN P C A. ~~Sgt. Pelletier.~~

Partyka

J J McN P C Q. When you and ~~Pelletier~~ started back at 10 minutes to 11, 4 miles distant from this base, did you ride your bike the entire 4 miles?

A. When he overtook me, I was riding. We got off and continued walking up the hill together. We got to the top of the hill. We went to the corner where you turn right at East Bergholt to come toward the base and I suggested

a smoke. It was warm that evening. We had a smoke for about 5 minutes.

Q. After you stopped for 5 minutes what did you do?

A. We proceeded back to the base.

Q. Did you ride quickly or slowly?

A. Just rode along slowly. We were conversing about some of his dates he had down that way and I was telling him about a young lady I went with in Ipswich.

Q. What was his condition when you met him?

A. He had maybe a couple of drinks. He was not drunk.

Q. What time did you reach Gate #2?

A. I would say between 11:15 and 11:30.

H J McN
D P G

Partyka

Q. Was ~~Pelletier~~ with you at that time?

A. Yes, sir.

Q. Where did you go after you reached the gate?

H J McN
D P G

Partyka

A. At the gate I asked ~~Pelletier~~ if he would like to go up to the Mess Hall and get a sandwich and a cup of coffee. He said he would. We went there then.

A. About what time was it you got to #351 Mess Hall?

A. Between 11:15 and 11:30.

Q. You are sure it wasn't later than 11:30?

A. I am positive.

Q. When you arrived at the Mess Hall who was there in that mess hall?

A. There was S Sgt. Page in the dining hall and there was another sergeant sitting with him. I didn't know his name at that time.

Q. Did you subsequently determine what his name was?

A. I can't recall it.

Q. Who else was there?

241 A. I went back in the kitchen to get a cup. I always kept my equipment there.

Q. You worked at that Mess Hall?

Partyka

A. Yes. I got a cup and ~~Pelletier~~ came out and I got him a cup of coffee and told him to help himself to food on the counter. He made a sandwich and we stood there talking.

Q. Who else was there?

A. LaPage and this other sergeant. A fellow named Prettyman was on duty making meatloaf for the following day. In the back room was Sgt. Pelletier, Sgt. Callendar, 1st Sgt. Hayes of the 351st.

Q. Did you have occasion to see and speak with them?

H J McN
D P G

A. I spoke to all of them.

Q. How long did you stay there?

A. I was in the Mess Hall that evening until after 12 o'clock. It was quite some time after 12 that I returned to my barracks.

Q. Private Smith, you have been seated here during the entire case.

A. Yes, sir.

Q. You heard all the testimony of the complaining witnesses. Did you ever see the girl known as Miriam Cullum before?

A. No, sir; I have never seen that girl before, except at the identification parade that day.

Q. Tell us the circumstances you saw her under at the identification parade.

A. I was asked by Lt. Todd if I would be in an identification parade. I said I would. They informed me what I was under suspicion for and what the parade was for and there would be two girls to look me over. That there would be 15 men and I could pick out my place in the line and these girls would try to identify me.

Q. Did you have occasion to see Miriam Cullum at the identification parade and describe the circumstances thereunder.

A. The first time I seen Miriam Cullum, I was standing approximately in the center of these 15 men in the identification parade. She was brought out of the guardhouse.

Q. Were you standing alone at the time?

A. No, sir; I was standing among these 15 men and at that time there was one of these C. I. D. men, an American civilian, standing in front of me a little off to my left, talking to me.

Q. Did he have his hand on any of your person at the time?

A. His hand was on my shoulder.

242 Q. I understand you clearly then, you never saw Miriam Florence Cullum before July 18th, which is the time of the identification parade, is that correct?

A. Yes, sir.

Q. You certainly did not see her on the night of July 11th?

A. I certainly did not.

Q. Tell this court the circumstances under which you had occasion to see the other complaining witness, Winnie Dale?

A. She was brought out of the guardhouse in the same manner as the other one and I seen her when she got out in front of myself and the other 15 men.

Q. Had you ever seen her before the identification parade and had she seen you?

A. Yes, sir; she had.

Q. Had you ever spoken to her before?

A. No, sir.

Q. Did she know you to say hello to you?

A. She might have known somebody I had been with several times.

PROSECUTION. Object. Ask that it go out.

DEFENSE. I consent to that. Answer that question directly. Did she know you to say hello to?

A. I couldn't answer that truthfully, sir. I don't know whether or not she would.

Q. Where had you had occasion to see her before?

A. I have seen her on the road several different times. I have seen her in pubs in East Bergholt.

Q. Did you see her on the night of July 11, 1944?

A. No, sir; I did not.

Q. Do I understand you to say you did not see her on the night of this alleged crime at all?

A. That is true, sir.

Q. Pvt. Smith, there has been certain testimony with reference to a wound on your left hand. Would you be good enough to tell this court the circumstances under which you got that wound?

A. Yes, sir. I was working in the 351st Mess Hall. It was in the afternoon and it was on the following Thursday—the Thursday that followed the Tuesday of this alleged crime. I was opening cans of milk and I had my hand on a can of milk to open it with a cleaver and
243 I happened to get too close to that hand and took a good nick out of it. At that time it was bleeding pretty much and I had one of the men on duty—I asked him if he had a band aid and he said he did have one in the back room.

Q. Who was that man?

A. Sgt. Pelletier, my shift leader.

Cross-Examination.

Questions by PROSECUTION.

Q. How many drinks had you had on the night of July 11th?

A. I had about 4 or 5 drinks.

Q. How many drinks of liquor?

A. I had no liquor on that night, sir.

Q. Did you ever tell Lt. Todd it was Sgt. Callenday whom you asked for a band aid and whom you told you had cut your fingers?

A. No, sir, I don't believe I did.

Q. Have you been convicted of a military offense within one year of the date of this offense?

DEFENSE. Objected to. He is merely on a fishing expedition. If there are crimes, they go to the credibility of the witness.

PROSECUTION. I am asking about military convictions. I can ask him about previous military offenses.

LAW MEMBER. If it affects his credibility as a witness.

PROSECUTION. Let him answer the question.

DEFENSE. That is like locking the door after the horse is stolen.

PROSECUTION. I withdraw the question. What kind of cycle were you riding on the evening of 11 July?

WITNESS A G. I., R. A. F. bike.

Q. What color was it?

A. Khaki, and it had a black new fender.

Q. How many teeth do you have out?

A. One tooth.

Q. On which side of your mouth?

A. The left side of my mouth.

Q. How about your other teeth? Is there some space between them?

A. Not too much.

PROSECUTION. Will you open your mouth and show the court your teeth?

244 The accused opened his mouth, indicating his teeth were somewhat widely spaced.

PROSECUTION. One tooth is out here on the left front. Are there any more teeth out?

ACCUSED. One back here.

Q. That is all on the left side?

A. Yes.

Q. What time did you get the new can opener that is in the Mess Hall? What date?

A. I don't know what date that was.

Q. Wasn't it before the 13th of July?

A. It is possible.

Q. Before that time you had been using cleavers?

A. Yes, and we were using cleavers at that time.

Q. Weren't you instructed to use the new can openers?

A. Not to open milk, sir.

Q. How long would you say you stayed at the Mess Hall after you came back to the post?

A. Sometime after 12.

Q. Approximately, what time after 12?

A. It could have been anywhere from 12:15 to 12:30.

Q. Is there no clock in the Mess Hall?

A. Yes.

Q. Did you look at the clock?

A. I believe I looked at the clock when I went out.

Q. Are you sure you looked at the clock?

A. I believed I did.

Q. What did the clock read?

A. It was sometime between 12 and 12:30. I don't remember exactly.

Q. How far is it from the Mess Hall down to your Barracks Orderly Room?

DEFENSE. Object. He said: "barracks Orderly Room"

LAW MEMBER. That is the squadron Orderly Room?

A. Yes.

245 LAW MEMBER. Objection overruled.

ACCUSED. I would say it was a distance of from here to the flag pole.

PROSECUTION. How many feet?

A. I am not good at measuring feet. It is about a short city block.

Q. Did you go direct from the Mess Hall to your Orderly Room?

A. Yes, sir.

Q. Did you stop on the way?

A. Usually—

PROSECUTION. Not what you usually do, but what did you do this night?

A. I went thru my barracks, threw my hat and coat on the bed and went right on to the Orderly Room.

Q. You didn't stop anywhere on the way?

A. No, sir.

Q. How long did it take you to go from the Mess Hall to the Orderly Room and the route you took?

A. I would say a couple of minutes, that is all.

Q. Do you remember when you signed a statement for C. I. D. agent on July 18, 1944?

A. I do.

Q. Do you remember in that statement saying: "I had something to eat and then I went to the Orderly Room where I signed in. It was then about 1 A. M. but I signed

in the time as something before 0100 hours which you say you saw Spires.

A. Yes, sir.

Q. Now you say you left the Mess Hall somewhere between 12:15 and 12:30 and it took you from one to two minutes to get to the Orderly Room. That is what you say now?

A. Yes, sir.

Q. Which is the correct statement: the one you gave on the 18th of July that it was about 1 A. M. you signed in, or was it approximately 12:17 or 12:32 when you signed in?

A. When I made that statement, I was a little confused.

Q. Are you more certain of the time now?

A. Yes, sir.

Q. You are not more sure of the time than you were on the 18th of July?

A. It could have been any time between 12 and 1.

246 Q. In other words, you are not sure what time it was that evening?

A. After 12 o'clock I am not sure of the time.

Q. Your judgment of time after 12 o'clock was not as good as it was before 12 o'clock on this evening?

A. There was no reason to remember the time after 12 o'clock. I was outside, there was no clock or anything.

Q. Was there an occasion before 12 o'clock for you to remember the time?

A. Yes, sir.

Q. What was that occasion?

A. At that time the radio was on.

Q. Is that the only reason you remembered the time that particular evening?

A. And the fact certain peoples were in the Mess Hall that usually came in at a certain time.

Q. You noticed the people particularly before 12 o'clock but did not have occasion to note the time after 12 o'clock?

A. After I left the Mess Hall I didn't see anybody.

Q. When you were in Brantham, after 10:40, did you see any clocks after that time?

A. After I left the pub, I didn't see any clock.

Q. How long did it take you to cycle from the corner at East Bergholt up to the post?

A. I would say between 30 and 40 minutes, sir.

Q. What time was it you say you left East Bergholt?

A. What time do you mean?

Q. When you started to cycle back to the post?

A. I got to East Bergholt about 5 or 10 to 11.

Q. That is how far from the post here—Gate 2?

A. About anywhere from 3 to 3½ miles.

Q. You say it took you approximately 30 minutes to cycle that?

A. Yes, sir.

Q. So that would get you to the post about 11:35?

A. Between 11:15 and 11:30.

Q. On your own time, if you got to East Bergholt at about 5 minutes to 11, it would take you about 30 minutes or thereabouts to cycle?

247 A. About.

Q. You stopped 5 minutes on the way?

A. That is included in that, sir.

Q. How long did you stop at Gate 2?

A. We were there for I would say a couple of minutes.

Q. Were you sure about the time then?

A. Approximately.

Q. You are not sure whether it might have been 15 minutes either way?

A. I am practically sure it could not have been later, sir.

Q. Later than what?

A. Later than 11:15 or 11:30. It was in between there.

Q. When you were down at the pub, before you started home, did you see any girls there?

A. In the pub, sir.

Q. Outside the pubs?

A. No, sir, I didn't.

Q. Did you see the girl Miriam Cullum at that time?

A. No, sir.

Q. Did you see the girl Sheila Dale at that time?

A. No, sir.

Q. At any time that evening did you cycle toward Manning Tree to look for a pub to get a drink?

A. No, sir.

Q. When you came back to sign in, you didn't sign in the time you really arrived at the Orderly Room, did you?

A. No, sir; I didn't.

Q. You put down some other time than the time you got there?

A. We usually guessed the time. That has been the practice of all the fellows.

Q. Did you guess the time?

A. I just put down 2400, or 2300, I don't remember which it was. There were so many nights I was out.

Q. At the time of the line-up at the identification parade you consented to that, did you?

A. Yes, sir.

248. Q. The two girls, Miriam Cullum and Sheila Dale did not come out at the same time, did they?

A. No, sir.

Q. You chose your own place in line, did you not?

A. Yes, sir.

Q. No one placed you in any particular spot, did they?

A. I wasn't given time enough to change my position before the second girl was brought out.

Q. She was not present at that time, was she?

A. The C. I. D. man asked me if I wanted to change my position in the line but before he had completed talking to me the other girl was brought out and I never had an opportunity to change my position. If I had changed at that time, everyone could have seen me changing my position.

Q. The two girls weren't there at the same time, were they?

A. No, sir.

Q. How long was it after the girl Miriam Cullum disappeared from your view that Sheila Dale was brought out?

A. I would say it was only a matter of 30 seconds to a minute. One was taken in and the other brought right out.

Q. You didn't see them stop to talk at any time?

A. I was standing with my back to the door.

Q. You did have a cut on the meaty portion of your left thumb, did you not?

A. Yes, sir.

Q. But your hands were behind your back in the identification parade?

A. Yes, sir.

Q. The girls did not look at your hand, did they?

A. No, sir.

Q. After you were identified by the two girls at different times, did they then go down the line to look at the other men?

A. This one girl was practically forced to go down the line to look at the men.

Q. She did look at the men?

A. She had her head half covered up but was looking at them.

Q. What girl was that?

A. Miriam Cullum.

249. Q. Sheila Dale walked down the line, didn't she and looked at the other men?

A. Yes, she did.

Q. There was no hesitation with the girls in picking you out, was there?

A. Sheila Dale walked down the line and I didn't just remember how it was she picked me out. The other one stood off to the side and she had hysterics or something and one of the officers or C. I. D. men walked over to me and she put her hand on me.

Q. You weren't asked to show your teeth then, were you?

A. No, sir.

Q. There was nothing unfair in your mind about the identification parade?

DEFENSE. I object to that; it is relatively unimportant.

Law MEMBER. Objection sustained.

PROSECUTION. How many pubs were you in that night trying to get a drink?

A. I was in the Red Lion in East Bergholt. They didn't have anything in there—only mild beer.

Q. You went to the Bucks Horns?

A. I rode past another pub in East Bergholt and asked one of the boys what they had to drink but didn't go in.

Q. You went to the Bucks Horns?

A. Yes, sir.

Q. You went to the Ark, did you not?

A. Yes, sir.

Q. You went to the Club?

A. Yes, sir.

Q. How many other pubs did you go to?

A. That is all. The Ark, the Club, the Bucks Horns and the Red Lion are the only ones.

Q. Did you see anyone in any of these pubs you named?

A. Yes, sir.

Q. Did you see anyone in the Ark pub that you knew, at the time it was closing?

A. Yes, sir.

Q. Who was that?

A. A fellow named Swiatek of the 351st.

250 Q. Did you see anyone else?

A. Not in the Ark. He was with a young lady.

Q. Do you know whether he saw you?

A. He seen me because I spoke to him. I spoke to his lady friend, too.

Q. Isn't it true, Private Smith, you didn't get back to your base until approximately a quarter of 12?

DEFENSE. Object to that as already asked.

Law: Misstates. Overruled. It is legitimate cross examination.

Witness. I got back between 11:15 and 11:30, sir.

Prosecution. You only set that time by reason of the fact you left the Ark pub at about 10:40, as you say? Is that right?

A. Yes, sir.

Examination by the Court.

Member of Court. You first stopped at the Red Lion?

A. Yes, sir.

Q. Did you have beer there?

A. No, sir. They had nothing but mild beer.

Q. You went to the Bucks Horns?

A. I rode past the Hare and the Hounds and asked one of the fellows what they had. I next stopped at the Bucks Horns Inn.

Q. You next went to the Ark?

A. Yes, sir.

Q. Then the place called the Club? Then back to the Ark and you had a drink in the Ark each time?

A. I had two small glasses of beer in the Ark.

Q. You were in the Ark twice that evening for beer each time?

A. Yes, sir.

The accused was then excused and resumed his seat.

Partyka, Andy (NMI), Private, Detachment A, 1260th MP Company (Avn) AAF Station F-157, a witness for the Defense, was sworn and testified as follows:

Direct Examination.

Questions by Prosecution.

251 Q. State your name, grade, organization and station.

A. Private Andy Partyka, 33677026, Detachment A, 1260 MP Co. (Avn) Station F-157.

Questions by Defense.

Q. Private Partyka, where were you on the night of July 11, 1944?

A. I was down at Manning Tree.

Q. What were you doing there?

A. Just loafing around and drinking.

Q. At the various pubs?

A. Yes, sir. I had been to quite a few pubs.

Q. At about 10 o'clock in the evening what pub were you at?

A. I was at the Bucks Horns.

Q. Until what time did you stay at the Bucks Horns?

A. Until 10 o'clock. I was drinking beer first of all I was with a few girls and I was drinking beer with them. We finished drinking beer and I went on my cycle with one of the girls to the first bridge. We stayed there about 15 to 20 minutes and then I went on home.

Q. You were at the first bridge coming from Brantham to Manning Tree with this girl until about what time? You left the pub at 10 o'clock, didn't you, or rather at 10 minutes after 10?

Law Member. Who is testifying?

Defense. He has already testified to that.

Law Member. I think we had better cut out the leading questions as much as we can.

Defense. What time did you actually leave the Bucks Horns?

A. It was a little after 10 because I took a little time finishing my beer.

Q. Where did you go then?

A. I cycled with this girl down to the first bridge.

Q. You stayed with her about 15 or 20 minutes and then left this girl?

A. Yes.

Q. What time was this?

A. About 25 after 10.

Q. Then what did you do?

A. Then I was on my way home and then met up with Smith.

252 Q. Where did you meet Smith?

A. On the way coming home.

Q. About how far was it from where you left the girl at the first bridge?

A. About ¾ of a mile.

Q. About what time did you meet Smith?

A. About a quarter to 11.

Q. What was he doing then?

A. He was cycling up the hill and I caught up with him. I rode in with him.

Q. Did you ride in directly?

A. We came up to East Bergholt and stopped.

Q. What did you do?

A. We had a smoke.

Q. How long did you stay there?

A. About 5 minutes.

Q. Then what did you do?

A. We came home.

Q. What gate did you come into?

A. Gate #2.

Q. What time did you reach that gate?

A. Near 11:30.

Q. How long did it take you to bicycle home from the point you met Smith? What time did you meet Smith?

A. About 25 minutes after 10?

DEFENSE. By virtue of the caliber of the witness, I think I should be permitted to lead him somewhat.

LAW MEMBER. Help him out a little bit.

DEFENSE. You say you left the girl at 25 minutes after 10 and traveled ¾ of a mile to meet Smith.

WITNESS. It took me about 10 minutes before I met Smith after I left the girl.

Q. What time do you figure that?

A. About a quarter to 11.

253 Q. Did you ever know Smith before?

A. No, sir.

Q. Ever seen him before?

A. No, sir.

Q. Did he ever talk to you and ask you to testify?

A. No, sir.

Q. You realize full well what the penalties are for telling anything but the truth to this court?

PROSECUTION. I object to the line of questioning.

LAW MEMBER. Overruled.

PROSECUTION. By reason of these questions he is giving greater weight to the testimony, ~~thus is accepted by the court~~. There might be some members of the court who would be influenced by this type of questioning. Therefore, I think it is objectionable.

LAW MEMBER. Overruled. It is the court's problem to judge the weight of the testimony.

DEFENSE. You know the penalty for not telling the truth to this court?

WITNESS. Yes, sir.

Q. You know the testimony given here is the truth?

A. It is the truth.

Cross Examination.

Questions by PROSECUTION.

Q. Private Partyka, you were pretty tight this night?

A. I was feeling high, yes.

Q. You don't know how long you stayed with the girl down there, not really?

A. I figured it was about 20 minutes.

Q. It may have been longer than that, couldn't it?

A. It could have been.

Q. You are not sure what time it was?

A. I used my own judgment that it would be 20 minutes.

Q. But you are not sure what time it was?

A. No.

Q. The same thing when you came on the post, you are not sure what time it was; you were still feeling pretty good?

254 A. Yes, sir. All the time I didn't know what time it was.

Q. You were just taking what you thought the time was. It may have been close to midnight when you came on the post?

A. Yes, sir.

Re-direct Examination.

Questions by Defense.

Q. You were able to ride the bicycle back from town?

Prosecution. Object.

Law Member. Overruled.

Witness. Yes, sir; I was.

Q. You weren't too drunk you couldn't

Prosecution. Objection.

Law Member. You are leading the witness. Sustained.

Defense. You know the caliber of the witness.

Defense. (To witness) When you got to Gate 2 on the evening of July 11th, who was on duty?

A. Sir; I don't know, but Wakley was on duty.

Prosecution. I object. The witness said he didn't know, but he found out later.

Witness. I didn't know exactly, but I found out later.

Prosecution. I ask that go out.

Law Member. Overruled.

Prosecution. He didn't know who was on the gate, but taking somebody else's word.

Law Member. How did you find out.

Witness. Thru some of the boys.

Law Member. Someone told you?

Witness. Yes.

Law Member. That is incompetent and will be disregarded by the court.

Defense. What time do you figure you came thru the gate finally?

PROSECUTION. I object. He is trying to rehabilitate the witness.

DEFENSE. The question doesn't need rehabilitation.

255 PROSECUTION. The question was "What time did you come thru the gate finally?" He is trying to rehabilitate the witness after I have taken him on cross examination.

Law MEMBER. If you want to ask your question, I am not going to limit you, but the matter has been pretty thoroughly gone into.

DEFENSE. I will withdraw the question.

DEFENSE. (to witness) Did you have lights on your bicycle?

A. I had a light, but did not have the light on.

Q. Why didn't you have it on?

PROSECUTION. Objection. It is not relevant or material to the issues.

DEFENSE. Certainly that is going to fix the time for us.

Law MEMBER. That wouldn't fix the time. Ask him a direct question—whether it was light or dark.

DEFENSE. At the time you came into the gate finally, was it light outside or was it dusk or was it dark?

WITNESS. It was dusk.

Q. By "dusk" what do you mean?

A. Getting dark. It wasn't dark yet.

Law MEMBER. Wait a minute.

DEFENSE. He is testifying. I am not putting words in his mouth.

Law MEMBER. Go ahead.

DEFENSE. You say it was dusk at that time?

A. Yes, sir.

Q. You had lights on your bicycle but did not have them on?

A. Yes, sir.

Q. Do you know what time the black out was that night?

PROSECUTION. I object to that question.

Law MEMBER. Objection overruled.

WITNESS. No, sir.

DEFENSE. Do you know what time it was necessary for you to put your lights on your bicycle?

PROSECUTION. Objection.

Law MEMBER. Sustained.

256 Examination by the Court.

President of Court. How do you know it was 10 o'clock when you got your last beer in the pub?

A. Sir, how I know it was 10 o'clock, I got my beer and the woman yelled out "Time, please." I got my beer and left.

Q. What pub was that?

A. The Bucks Horn.

Q. The woman called "Time" and you had your last beer?

A. Yes, sir.

Q. Then you went outside with this girl?

A. Yes, sir. I went down to the first bridge toward Manning Tree.

Q. What did you talk about when coming back with Smith?

A. When I first met him I said: "I'll ride in with you."

Q. Were you talking with him all the way back to Camp? Did you know Smith before you met him on the road that evening?

A. No, sir; I never met up with him. That was the first time.

Law Member. Did you know Private Wakley?

A. Yes, sir.

Q. How long have you known him?

A. Ever since I have been put in the M.P. Co.

Q. How long was that?

A. About 11 or 12 months.

Q. You don't recall seeing Pvt. Wakley at the gate that night. Had you had so much to drink you couldn't see him?

A. I was feeling high, but it wasn't that. I wasn't paying much attention.

Q. Did you stop to show your pass?

A. I believe so. I pulled my pass out of my pocket.

Q. Where do you check in when you come in at night?

A. I had a pass but I didn't sign out.

Q. When you are signed out where do you sign yourself back in?

A. In the MP Orderly Room.

Q. Is that a different orderly room from the Fighter Squadron?

A. Yes, sir, a different one.

Q. Have you ever been in the Ark—a pub known as "The Ark"?

A. Yes, sir.

Q. That night?

A. No.

Q. Any time?

A. Yes, sir.

Q. What town is The Ark in? Where is it? Is it at Manning Tree or Brantham or where? What town is it in?

A. I don't know a pub by the name of Ark.

Q. Is the Bucks Horn in Brantham?

A. Yes, sir. It is the first pub as you come into Brantham on your left.

Q. Do different pubs in Brantham have different closing hours?

A. I don't know.

Q. Do they all close at the same time?

A. I don't know, sir.

Q. Do you know anything about this pub called the Ark?

A. No, sir.

President of the Court. You have been in a lot of pubs?

A. Yes, sir.

Q. Do they all close at the same time?

A. Sir; I don't know. From what I hear some of the pubs close during the summer at 10:30.

Q. Have you been in other pubs at closing time?

A. These other pubs close at 10 o'clock. That night I didn't know what time it was.

Q. You just know they called "Time."

A. That is all.

Q. You didn't look at a clock at all?

A. No, sir; I didn't.

Prosecution. I take it then, Pvt. Partyka, from your testimony you don't know whether it was 10 or 10:30 that the pub closed?

A. Yes, sir; I don't know if it was 10 or 10:30.

258 Defense. He doesn't understand your question.

Prosecution. You don't know whether it was 10 or 10:30 at the time they closed the pub you were in?

A. No.

Q. On the way back did you have any conversation with Pvt. Smith about girls?

A. He was telling me he had a girl out but didn't mention any names.

Q. Did he tell you where he had the girl out?

A. No, sir.

Q. Did he tell you where he had had the girl that night?

A. No, sir. He didn't tell me at all.

Q. Do you remember the conversation I had with you in the office with Lt. Todd yesterday?

A. Yes, sir.

Q. Didn't you tell me at that time Pvt. Smith told you he had a girl in Manning Tree that night?

town

A. No, I didn't say what time. He told me he had a girl that night. That is as much as I remember now.

Law Member.

Q. What did he mean when he said he had a girl?

A. He didn't mention any town.

Law Member.

Q. Did he mean he had been out with a girl, or had intercourse with a girl?

A. Just he had been out with a girl.

Law Member.

Q. He didn't say where?

A. No.

Law Member.

Q. Nor the time?

A. No.

Law Member.

Q. Was anything said between you and Smith when you were on your way back to the post about what time it was?

A. No, sir.

Law Member.

Q. The time was not mentioned one way or another?

A. No, sir.

President of Court. Your didn't sign into the Orderly Room when you returned?

A. No, sir.

The witness was then excused and withdrew from the room.

259 Pelletier, Joseph C., Sergeant, 351st Fighter Squadron, AAF Station F-157, a witness for the defense, was sworn and testified as follows:

Direct Examination.

Questions by Prosecution.

Q. State your name, grade, organization and station.

A. Sgt. Joseph C. Pelletier, 351st Fighter Squadron, Station F-157.

Questions by Defense.

Q. I direct your attention to the night of July 11th. Did you have occasion to see Pvt. Smith that evening?

A. Yes, sir.

Q. What time was that?

A. Between 11 and 12 o'clock.

Q. How do you fix that time?

A. It was shortly after the A.F.N. news bulletin.

Q. What time did the A.F.N. news bulletin end?

A. I couldn't say correctly. It was some time between 11 and 11:15.

Q. You are sure you were listening to the A.F.N. news?

A. Yes, sir.

DEFENSE. I ask the court to take judicial notice that the A.F.N. news goes off the air at 5 minutes after 11 every night.

LAW MEMBER. The court cannot take judicial notice of that. It has to be proven.

DEFENSE. Will you stipulate to that, Captain McNeal?

PROSECUTION. No, I will not.

DEFENSE. How long after the A.F.N. went off the air did the defendant come into your room?

A. A few minutes.

Q. 10 minutes?

A. Probably less.

Q. 10 minutes or less after the A.F.N. went off the air?

A. Yes, sir.

Q. That was the 11 o'clock news broadcast?

A. Yes, sir.

Q. Did you have occasion to listen to the radio?

260 A. No, after that was over we changed the station to B.B.C.

Q. Did you listen to the 12 o'clock news?

A. Yes.

Q. You are sure this wasn't the 12 o'clock news but the 11 o'clock news?

A. Positive.

Q. And that it was 10 minutes after the A.F.N. went off that Smith came in?

A. That is right, sir.

Q. A day or two after July 11, 1944 did you have occasion to see Smith's hand and a bruise thereon?

A. Yes, sir.

Q. Will you tell the court the circumstances under which you saw it?

A. I believe it was on a Thursday in the morning, approximately 9 or 9:30. I was in the room in back of the mess hall, where we sleep and keep the medical aid kit. Smith came in with a cut on his hand.

Q. Which hand.

A. I don't know. I don't recall whether it was the right or left.

Q. How did he cut that, did he say?
A. While he was opening cans.
Law Member. Did you see him cut it?
A. No, I didn't, but I know what he was doing at the time.
Prosecution. I ask that his testimony about how he cut it go out.
Law Member. Unless you saw him cut it, or know in some manner other than him telling you, it wouldn't be competent.
Witness. It was cut by a cleaver.
Prosecution. Objection—ask that that go out.
Q. Did you see it cut?
A. I didn't see it.
Q. Did you see the blood running?
A. Yes.
Q. Did he tell you how he cut it?
Prosecution. Objection.
A. He said he cut it.
Defense. If the blood was running at that time and that was the *res gestae* at that time, it would come within the rule. He testified the blood was flowing.
261 Law Member. He may testify the blood was flowing but what Smith told him as to the manner he cut it is incompetent.
Defense. Did you have occasion to see Smith at that time?
A. Yes, sir.
Q. Did he have any other marks or cuts at that time?
A. Not that I noticed.
Q. You knew Smith before this trial?
A. Yes, sir.
Q. What is your relationship to him?
A. I was his chief cook here at this base.
Q. Have you ever talked to him concerning this case?
A. No, sir.
Q. Did he ever threaten you or ask you to testify for him?
A. No, sir.
Q. All the testimony you have given to this court has been the truth?
A. Yes, sir.

Cross Examination.

Questions by Prosecution.
Q. Sergeant, what time did you go to bed on the evening of 11 July?

A. About 10:15.

Q. Did you go to sleep?

A. No, sir; I was lying in bed reading.

Q. You said Smith came in some time between 11 and 12 o'clock that night?

A. That is right.

Q. You are not sure when he came in?

A. He came in shortly after 11, he spoke to me, went out of the room and came back again.

Q. You didn't have any watch, did you?

A. No, sir.

Q. You didn't look at any watch?

A. No, sir.

Q. Or clock?

A. No.

262 Q. It is just your judgment what time it was?

A. I recall the A.F.N. news and about 15 minutes later the B.B.C. came on.

Q. It was just your judgment by the one news broadcast when it came on and Smith came in. You may have been wrong about your judgment?

A. It was in between the hour of 11 and 12.

Q. Isn't it true you told Lt. Todd that Private Smith had a cut on his index finger or another finger and that he did not have a cut on his thumb?

A. The finger for the thumb—I wasn't quite sure.

Q. You don't know whether it was the right or left hand?

A. The right, sir.

Q. You don't know that prior to his coming in to show you the cut he had had a cut there before?

A. No.

Examination by the Court.

President of Court: You were in your room when Smith first came into the room?

A. Yes, sir.

Q. Why did he come in your room? What did he do in your room?

A. As a rule each night when any cooks went out they usually come back thru the Mess Hall and have a cup of coffee before going to bed. He came into the room and spoke to me about what we were supposed to have the following night.

Q. What did he do when he came into your room the second time? Did he say anything to you or did you say anything to him?

A. When he came in I believe he came in to take his blouse off the hook. As a rule when they come in they put their blouses on the hook.

Q. When was that?

A. 12 o'clock.

Q. Approximately 15 minutes later after he left the second time you heard the B.B.C. news?

A. Yes.

Q. What time did they announce?

A. 12 o'clock, sir.

Law Member. When you go out on pass are you required to sign in when you come in? Where do you sign in?

A. In the Orderly Room, sir.

263 Q. Is it in a book?

A. Yes, sir; they have a sign out and sign in sheet.

Q. Do you sign on a single sheet or in a book where a lot of others sign?

A. Where a lot of others sign in, sir.

Q. How many men do you have a night on pass in the 351st Fighter Squadron?

Defense. May I point out that the error is mine. The defendant is a member of Headquarters 353rd Group. This boy is a member of the 351st Fighter. They mess together.

Law Member. Would you sign in the same place that Smith would sign in?

A. No, sir.

Q. You sign in at the 351st Fighter Squadron?

A. Yes.

Q. He signs in at the 353rd Headquarters?

A. Yes, sir.

Q. What part of his hand was this cut on that you saw?

A. Sir, I remember dressing the cut for him. I am not sure if it was the left or not.

Q. Put your left hand out. What part of that hand would that cut be on?

A. Somewhere around here—if it was cut by opening cans.

Q. I am speaking about the cut you saw—what part of his hand was it on?

A. It would be somewhere around here. (Indicating the back of the left thumb.)

Law Member. Where would you say in opening cans you would normally cut your hand?

Prosecution. Objection—not competent.

A. At the time we were opening cans with cleavers.

Q. What do you hold the can with?

A. The left hand.

Q. If you are right handed, you hold it with the left hand and swing the cleaver with the right?

A. Yes.

Q. Where did you say the cut you saw was?

A. I would say it was somewhere around the thumb and finger. I couldn't say just where it was. We see so many cuts.

Q. If a man was holding a can in his left hand and using a cleaver with his right, how could the cut be on the inside of his hand. I withdraw the question if there is any objection.

264 DEFENSE. No, sir.

LAW MEMBER. If you open a can with a cleaver, you don't know how the can is going to open or how the tin is going to come out.

A. By pushing the can away you are likely to cut yourself most anywhere.

PROSECUTION. I ask that that portion of the testimony go out as being purely speculative.

DEFENSE. He could have objected at the time the question was asked.

LAW MEMBER. Objection is overruled.

LAW MEMBER. (to witness) Do you know at what time—what was the final time you had to be in on this post on the 11th of July?

A. 12 midnight.

President of COURT. Did Pvt. Smith get a cup or a canteen from your room the first time he came in? Any container out of your room?

A. I believe he did, because as a rule they are always on our shelves.

Q. Do you know if he got one that night?

A. I couldn't state definitely.

Q. PROSECUTION. Do you sleep in the same barracks with the accused, Private Smith?

A. No, sir.

DEFENSE. Isn't it a fact your sleeping quarters are right in back of the Mess Hall? Inasmuch as you are a cook you sleep in the Mess Hall—in the back—and when the cooks come in they frequently come in to the back of your quarters?

A. Yes, sir.

HAYES, ROBERT A., 1st Sgt., 351st Fighter Squadron, AAF Station F-157, a witness for the Defense, was sworn, and testified as follows:

Direct Examination.

Questions by PROSECUTION.

Q. State your name, grade, organization and station.

A. Robert A. Hayes, 1st sergeant, 351st Fighter Squadron, Station F-157.

Questions by DEFENSE.

Q. Did you have occasion to see the defendant in this case on July 11th?

A. I did, sir.

Q. Tell the court the time and the circumstances.

265 A. It was approximately 11:30 or 11:45 I saw him in the kitchen of the Mess Hall in the 351st Fighter area.

Q. How do you figure that time?

A. I went back to the time I left a pub in Dedham. I left between 10:30 and 10:45. It is about a 30 minute ride from the pub. I was in the area 10 minutes and in the Mess Hall 10 minutes before I saw Smith.

Q. Therefore you figured the time to be 11:30?

A. That is right.

Q. Did you have occasion to go to your barracks and turn on the radio the night of 11 July?

A. No, sir.

Q. Do you know Smith?

A. I do, sir.

Q. Have you known him before this action?

A. I have known him about 4 months.

Q. Has he ever asked you since this action was commenced to come into this court and tell this story for him?

A. No, sir.

Q. Did he ever threaten you physically or otherwise?

A. No, sir.

Cross-Examination.

Questions by PROSECUTION.

Q. Sergeant, you are not sure whether this was the night of July 11th or not?

A. I am certain, sir.

Q. Do you remember telling Lt. Todd you didn't know whether it was the night of Tuesday the 11th of July, but it was one night last week?

A. That was the first time Lt. Todd questioned me but

then, when I thought back and checked up, I was able to recall it was the night I had been to Dedham.

Q. But the first time you talked to Lt. Todd you were not sure?

A. Not at that time.

Q. When you saw the accused, he came in from outside?

A. I am not certain.

Q. Do you remember telling Lt. Todd when you were in the kitchen the accused came in from outside with another soldier?

A. I meant outside the kitchen. I did not understand what you said. The Mess Hall is divided into sections.

266 Q. When you did turn around, you saw the accused with another soldier?

A. Yes, sir.

Q. You had not seen the accused in the Mess Hall before that time?

A. No, sir.

Q. You don't know exactly what time it was?

A. It was sometime between 2300 and 2400 hours. I can now place it closer—between 11:30 and 11:45.

Q. So that it may have been as late as 11:45 when you saw the accused there?

A. Yes, sir.

Q. Would it be as late as 2400 hours you saw the accused?

A. No, sir.

Q. You are sure it was no later than 2345?

A. Quite positive, sir.

Examination by the Court.

Law Member. On 11 July what was the time limit on your passes?

A. 1200 at that time.

Q. Are you sure?

A. I am positive. Because at that time it changed from 1200 to 0100.

The witness was then excused and withdrew from the room.

LaPage Edward R., S/Sgt. 351st Fighter Squadron, AAF Station F-157, a witness for the Defense, was sworn and testified as follows:

Direct Examination.

Questions by Prosecution.

Q. State your name, grade, organization and station.

A. Edward R. LaPage, S/Sgt., 351st Fighter Squadron, Station F-157.

Questions by DEFENSE:

Q. Sergeant, I direct your attention to the 11th of July 1944. Where were you on that day.

A. Colchester, sir.

Q. What did you do there?

267 A. I was on leave, sir—on pass.

Q. During that day did you have occasion to imbibe?

PROSECUTION. If the court please—

LAW MEMBER. I think the witness understands what he means. Overruled.

WITNESS. Yes, sir. I had a few beers

DEFENSE. How many beers did you have that day?

A. I would say around 10 beers.

Q. What time did you leave Colchester to come home?

A. Well, I would say approximately 20 minutes to 11.

Q. Tell us how you fix that time?

A. In the morning we reserved a cab to come home at 10:30. I imagine the cab wasn't there when we got to the stand. We got there at 20 minutes after 10. We waited 15 or 20 minutes.

Q. You feel certain it was no later than 20 minutes to 11 before the cab came?

A. Yes, sir.

Q. How long did it take you to ride from Colchester to this base?

A. 25 minutes.

Q. When you reached this base, state what happened.

A. We had our passes checked at the gate.

Q. About what time was that?

A. I imagine it was approximately 5 or 10 minutes after 11.

Q. What did you do then?

A. After the passes were checked I went to the barracks and then went over to the Mess Hall.

Q. How long were you in the Mess Hall before someone came in?

A. I would say approximately 5 or 10 minutes.

Q. Who came in?

A. Private Smith.

Q. About what time would you fix that?

A. Between 11:15 and 11:25 or 11:30.

Q. Between 11:15 and 11:30?

A. Yes, sir.

268 Q. You made a previous statement in this case wherein you said you left the Mess Hall at 2200. Do you remember writing that?

A. 10 o'clock?

Q. Yes.

A. I first talked to Lt. Todd and had the 18th and the 11th mixed up.

Q. What do you mean by that?

A. I was called off the line and I went into Lt. Todd's office. This was after the 18th and he asked me my actions and I got mixed up with the 18th and 11th.

Q. You told him on the 18th you came in at 2200?

PROSECUTION. You are asking him about his previous statement—about his activities on the 11th of July?

DEFENSE. That is correct.

DEFENSE. (to witness) Did you subsequently change that and say you had come in at 2300 on the night of the 11th?

A. Yes, sir.

Q. And had made an error on your previous statement?

A. Yes, sir.

Cross Examination.

Questions by PROSECUTION.

Q. Did you say you came in at 2300 hours on the 11th of July?

A. Yes, sir.

Q. Do you remember also telling Lt. Todd you do not remember the exact time the accused and the M.P. came in but that you think it was about a half hour or an hour after you were in the Mess Hall?

A. Yes, sir.

Q. It may have been a half hour or an hour afterwards that the accused came in?

A. I had the 11th and 18th mixed up.

Q. Was it a half hour or an hour?

A. I would say it was a half hour.

Q. Are you sure about that or is your first statement to Lt. Todd correct? Do you want to change your statement now?

A. No, sir.

Q. You are still not sure it was a half hour or an hour?

269 DEFENSE. Objection.

Law MEMBER. Objection overruled.

PROSECUTION. You still think it was a half hour or an hour after you and Sgt. Pleban went to the Mess Hall?

A. I think it was a half hour, sir.

Defense. And you got to the Mess Hall at 11:35?

A. Yes, sir.

Prosecution. If the court please, I have let a number of leading questions go in and I am going to insist now on the Defense asking questions properly and not seek to rehabilitate the witness.

Law Member. I think the T.J.A. is correct. Your questions should be entirely proper.

Defense. May I point out in the testimony this morning, where a girl was being examined, leniency was granted. In view of the mental caliber of this witness I ask the same be allowed.

Law Member. The court doesn't think that.

Law Member. (to witness) When did Lt. Todd take the statement from you?

Witness. I could not tell you. It was after the 18th.

Q. You said you were mixed up on whether it was the 11th or 18th?

A. Yes, sir.

Q. Did you see Pvt. Smith on both the 11th and 18th in the Mess Hall?

A. No, sir.

Q. How could you have been mixed up?

O. On the time of the evening. I told Lt. Todd on the 11th I came from the P.X. to the Mess Hall.

Q. How could you have been mixed up in all in regards to seeing him?

A. Where I was mixed up was my actions before I went into the Mess Hall.

Q. Were you mixed up in your statement when you said Private Smith came in a half hour or an hour after you came into the Mess Hall, regardless of whether it was the 11th or 18th?

A. No, sir.

Defense. I object and ask that be stricken.

Law Member. Overruled.

Witness. I believe it was a half hour. I didn't want to draw any special time. I didn't know what I was talking about.

Q. Why did you tell him it was between an hour and a half hour?

270 A. I wasn't setting no definite time.

Q. What makes you now think it was a half hour?

A. It was while I was eating that Smith came in and it surely wouldn't take me over a half hour to eat.

Law Member. You don't remember the date Lt. Todd took the statement?

A. No.

President of Court. After you arrived on the station the night of the 11th, did anything place the time exactly from the time you came into the gate until the time you left the Mess Hall? Any clock or watch?

A. No, sir. I have my own watch but to place it exactly, no, sir.

Q. You reckon all the time from the time you ordered the taxi in Clochester?

A. Yes, sir.

Q. Who was with Smith when he came into the Mess Hall?

A. Another soldier was with him.

Q. What did they do?

A. They walked by. I recognized Smitty and he recognized me. They went into the kitchen.

The witness was then excused and withdrew from the room.

PLEBAN, STANLEY, E., T/Sgt, 351st Fighter Squadron, AAF Station F-157, a witness for the Defense, was sworn and testified as follows:

Direct Examination.

Questions by PROSECUTION.

Q. State your name, grade, organization and station.

A. Stanley Pleban, T/Sgt, 351st Fighter Squadron, AAF Station F-157.

Questions by DEFENSE.

Q. Sergeant, I would like to direct your attention to the night of the 11th of July, 1944. What did you do that evening?

A. At about 9 o'clock I was down at the P.X. drinking beer.

Q. How long did you remain at that time?

A. I would say until about 10:15.

Q. How do you know it was that time?

A. The O.D. comes thru there and makes us get out about that time.

271 Q. Where did you go then?

A. I went to the barracks.

Q. Then what happened?

A. I was around the barracks about a half hour, maybe a little longer—until Sgt. LaPage came in from town and he suggested we get a cup of coffee.

Q. What time did LaPage come in?

A. About 11 o'clock.

Q. Did you go over to the Mess Hall?

A. Yes, sir.

Q. Did you see anybody you now recognize in this court thereafter?

A. Yes, sir.

Q. Who was that?

A. Pvt. Smith.

Q. About what time did you fix that this defendant came into the hall?

A. I would say close on to 11:30, sir.

Q. You are sure it was not later than that?

A. No, sir; it was about 11:30. I wouldn't be exact on the time.

Q. It was not 12 yet?

A. No, sir.

Cross Examination.

Questions by Prosecution.

Q. Did you look at any watch or clock on the evening of 11 July?

A. No, sir, except my own wrist watch.

Q. During the hours between 10:30 and 11:30 or 12:00 did you look at your watch?

A. I don't know that I did, sir.

Q. Do you remember talking to Lt. Todd on or about 22nd of July?

A. Yes, sir.

Q. Do you remember giving Lt. Todd a statement?

A. Yes, I remember.

Q. Do you remember telling Lt. Todd you saw the accused come in with a soldier who was an M.P. some time between 10:30 and 11:30 but that it was probably about 10:45 when he came in?

272 A. No, sir; it was later than that.

Q. Do you remember telling Lt. Todd it was probably 10:45 when you saw the accused?

A. I don't remember telling him that statement.

Q. Will you say you did not make that statement to Lt. Todd that the accused was seen about 10:45 that evening?

Defense. I object. He said he doesn't remember making that statement.

Law Member. Objection overruled.

Witness. No, sir; I wouldn't say I did not.

Prosecution. As a matter of fact, you don't know what time you saw the accused exactly that evening, do you?

A. Not exactly. I said about 11:30, sir.

Examination by the Court.

President of Court. Sergeant, what did you do after you left the P.X.?

A. I came up to the barracks, sir.

Q. What did you do?

A. I was around the barracks I would say a good half hour until Sgt. LaPage came in from town.

Q. You left the P. X. at what time?

A. About 10:15, sir.

Q. Does the P.X. always close at 10:15?

A. They close at 10, but we can leave there at 10:15. It's according to the O.D.

The witness was then excused and withdrew from the room.

SOMERHILL, GRACE, MRS., 63 South Street, Manning Tree, Essex, a British civilian, a witness for the Defense, was sworn and testified as follows:

Direct Examination.

Questions by PROSECUTION.

Q. What is your name?

A. Mrs. Grace Somerhill.

Q. Where do you live?

A. 63 South St., Manning Tree, Essex.

2939 Questions by DEFENSE.

Q. Mrs. Somerhill, how long have you been living at your present place of residence?

A. About 12 to 14 years.

Q. In this 12 to 14 years have you had occasion—you mean in the general community?

A. I was born in this community.

Q. You have lived in this community for 20 years?

A. Yes.

Q. During these years have you had occasion to know the young lady who bears the name of Sheila Winifred Dale?

A. Yes.

Q. What is her reputation in this community for chastity?

PROSECUTION. Objection.

LAW MEMBER. Overruled.

PROSECUTION. May I read an excerpt from Wharton's "Criminal Law", Section 762, as follows. "Prior Chastity of Prosecutrix: The prior chastity of prosecutrix is presumed in law in the absence of statutory provisions to the

contrary, and an attack upon her reputation in this regard and her good reputation therefore cannot be shown until attacked; and where there is no doubt that consent was absent and force was used, evidence of the chastity or unchastity of the prosecutrix is inadmissible."

Their defense is the accused was not there. The issue is not consent and therefore this testimony is not in issue.

LAW MEMBER. Overruled.

DEFENSE. Read the question.

The reporter read the question: "What is her reputation in this community for chastity?"

PROSECUTION. Object again.

LAW MEMBER. Overruled.

WITNESS. Bad.

PROSECUTION. I ask that the answer go out and the court be asked to disregard it. It is not competent or relevant.

LAW MEMBER. The motion to strike is overruled likewise.

DEFENSE. Have you had occasion to know the girl known as Miriam Florence Cullum?

A. Yes.

Q. What is her reputation for chastity?

274 PROSECUTION. I object to that question. We have not here an issue of rape in this case. It is assault with intent to commit rape.

LAW MEMBER. Objection sustained.

Neither the Prosecution nor the court cross-examined the witness.

The witness was then excused and withdrew from the room.

DEFENSE. The Defense rests.

PARTYKA, ANDY, Private, was recalled by the court as a witness, reminded he was still under oath and who testified as follows:

President of COURT. On the night of 11 July when you returned to the station, where did you go after you passed Gate #2?

A. Smith invited me up to the 351st Mess Hall for a sandwich, so I went along with him.

Q. What did you do in the Mess Hall?

A. I stood around about 5 or 10 minutes. Later, four or five fellows came into the Mess Hall.

Q. Did you have any coffee?

A. No, sir; I had a sandwich.

Q. Did you drink any coffee?

A. Yes, sir. Rather, I had a cup of coffee and a sandwich.

Q. Where did you get the cup?

A. Smith gave me his cup.

Q. Where was it?

A. He got it behind the Mess someplace.

DEFENSE. When you say he got a cup from the back of the Mess Hall, you mean he left you and went to another part of the Mess Hall and came back with his cup?

A. Yes, sir.

President of COURT. What do you mean when you say you are "high"?

A. That night I did.

Q. What do you mean?

A. I was feeling good.

Q. Do you stagger?

A. No. I rode my bicycle and knew what I was doing.

275 Q. Could you write your name?

A. Yes, sir.

Q. How much did you have to drink?

A. About 7 or 8 pints of beer.

Member of COURT. Do you remember seeing Sgt. Pellatier in the Mess Hall that night?

A. I believe two sergeants came in.

Q. Do you remember their names?

A. I don't know their names. They were strangers to me.

STERMAN WILLIAM E., Corporal, Hq. Det. 353rd Fighter Group, AAF Station F-157, a witness for the Court, was sworn and testified as follows:

Direct Examination.

Questions by PROSECUTION.

Q. What is your name, grade, organization and station?

A. Corporal William Sterman, Hq. Detachment, 353rd Fighter Group, Station F-157.

Questions by the COURT.

Law MEMBER. What duty assignment do you perform on the station?

A. Group armament, sir.

Q. On the night of 11 July, 1944, did you have any particular duty in connection with your organization unit?

A. I was Charge of Quarters.

Q. As Charge of Quarters did you have under your supervision the checking in of men who were on pass?

A. That is right, sir. They return their passes and sign in when they come in.

Q. Did you require on that night each man to check in and to put in the correct time he checked in, or did you have the actual supervision of it?

A. I didn't actually check each man. We leave the book on the desk and they bring in their pass and drop it on the desk. Some of the men may come in a little after I turn in.

Q. What time do you turn in?

A. I think that night I did not turn in. I had been reading.

276 Q. Do you remember what time you left the Orderly Room that night?

A. I slept in the Orderly Room. I guess the only time I was actually away from it was at 11 o'clock when I turned out the lights.

Q. Do you remember Smith coming in that night?

A. No, sir.

Q. After you turn the lights out, what procedure is followed by men checking in?

Q. They can turn on the lights, or use their flashlight, open the book and sign in.

Q. Do you have the book for 11 July?

A. Yes, sir.

Q. Is this the official checking book of the Headquarters 353rd Fighter Group?

A. Yes.

Q. Is there any objection to the court looking at this book on the basis of who made the entries, or whose custody the book is, or anything of that kind?

DEFENSE. May I look at the book first?

LAW MEMBER. Yes.

DEFENSE. I have no objection.

PROSECUTION. No objection.

LAW MEMBER. Corporal, will you make a copy of the entries in the Sign-in and Sign-out book for 11 July, 1944 and deliver it to the Trial Judge Advocate, and it will be received in evidence as Court's Exhibit #1—that on the basis there is no objection to a copy being substituted for the actual pages of the Sign-in and Sign-out book.

PROSECUTION. No objection.

DEFENSE. No objection.

LAW MEMBER. Do you happen to know what was the time limit on passes in your unit on 11 July?

A. I am not certain about it.

DEFENSE. Isn't it a fact, Corporal, the boys in your organization have come in while you were asleep and signed it unbeknown to you?

A. Yes, that is possible.

Q. And they usually don't sign in the actual time of coming in, but rather some arbitrary time before the expiration of their pass?

277 PROSECUTION. Objection.

LAW MEMBER. If he knows, he may answer.

WITNESS. Not to my knowledge.

DEFENSE. You mean if a man comes in at 11:30 he signs in at 11:30?

WITNESS. It might have been done but I have never seen it.

LAW MEMBER. You mean by yours answer that a man should sign in the actual time he comes on the post? It is supposed to be the time he comes in the Orderly Room.

DEFENSE. May I direct your attention to the first three entries of the book dated 7/11/44? The first one is 2300. The second is 2300. The third 2400. The fourth one is 2350, is it not?

WITNESS. That's right, sir.

DEFENSE. I now direct your attention to the entries under the date of 7/12/44. The first one on that line is 2300. The second is 2300. The third is 2300. The fourth is 2315 and the fifth is 2000. Is that correct?

WITNESS. That is right, sir.

PROSECUTION. Corporal, what does this represent as to the columns on the report?

WITNESS. The first column is the date they sign out; the second is the time; the name is the third; the destination is the fourth. When they return they put in the time again.

Q. So that the discrepancy between the hours means that a man must sign in the place he himself first signed out, in order to keep your records right?

A. That is right, sir.

MACGREGOR, ERNEST P., Captain, AC, Hq, 353rd Fighter Group, AAF Station F-157, was called by the court as a witness, was sworn and testified as follows:

Direct Examination.

Question by PROSECUTION.

Q. State your name, rank, organization and station.

A. Ernest P. MacGregor, Captain, AC, Hq, 353rd Fighter Group, AAF Station F-157.

Q. Do you know the accused in this case?

A. I do, sir.

Q. Is he in the military service of the United States?

A. He is.

Examination by the Court.

Law Member. You are the Commanding Officer of Headquarters, 353rd Fighter Group?

A. Yes, sir.

Q. Is the check-in and check-out book, just identified by Corporal Sterman, a part of the records of your organization?

A. Yes.

Q. Can you tell the court the time a member of your organization is supposed to check in, *i. e.*, is it the time at which he comes on the post or the time he actually checks himself in?

A. He is supposed to check in the time he comes into the Orderly Room.

The witness was then excused and withdrew from the room.

PELLETIER, JOSEPH C., Sergeant, was recalled by the Court as a witness, reminded he was still under oath and testified as follows:

Law Member. You testified about a man injuring himself opening a can.

A. Yes, sir.

Q. In what size cans is the milk supplied to your mess?

A. In small cans—half pint cans.

Q. Is that the only kind you get?

A. No, we also get the powdered milk cans.

Q. How do you open a can of liquid milk?

A. With a cleaver.

Q. Do you take the top off completely?

A. No, sir; just slit the top of the can.

Q. Do you just knock a couple of holes in it?

A. No, sir; take it right out of the can and put it in a 2½ gallon bucket.

Q. How is the can opened?

A. It is slit in the middle with a cleaver. They make one long slit in the top of the can.

Q. How do you open your powdered milk cans?

A. Some come in with a sort of metal opener on the cans, but others we have to open. We open the 5-gallon cans with a cleaver. It is a sort of very thin metal that can be cut with a knife.

279 President of Court. Do all cooks open cans that way?

A. That is the way we were opening them at that time.

Q. Do all cooks put one slit down the center?

A. On the milk cans, yes.

The court then at 10:50 P. M. on 25 August 1944, adjourned to meet at 9 o'clock, A. M., on 26 August 1944.

HARLEY J. MCNEAL,
Captain, J.A.G.D.,
Trial Judge Advocate.

VIII FIGHTER COMMAND,
AAF Station F-157,
26 August 1944.

The court met, pursuant to adjournment, at 9 o'clock A. M., all the personnel of the court, prosecution, and defense, who were present at the close of the previous session in this case, being present.

The accused and the reporter were also present.

BAKER, CYRIL, BUCKS HORN INN, Cadway, Brantham, England, a British civilian, was called as an additional witness by the Prosecution, was sworn and testified as follows:

Direct Examination.

Questions by PROSECUTION.

Q. State your name.

A. Cyril Baker.

Q. Where do you live?

A. Bucks Horn Inn, Cadway.

Q. Is the Bucks Horn located in Brantham?

A. Well, it is not exactly in Brantham, really.

Q. Do you operate the Bucks Horn public house?

A. Yes, sir.

Q. You are the owner?

A. Yes, sir.

Q. Calling your attention to the 11th of July 1944 were you in the Bucks Horn on that day?

280 A. Yes, sir.

Q. Could you advise the court at what time you closed your pub on that date?

A. 10:30.

Q. Approximately what time was it your public house was cleared of people who had had their last drinks?

A. About 20 to 11. I call time at 20 past and close at 10:30.

Law Member. That is your regular closing time?

A. Yes, sir.

Q. And that was the time on the 11th of July?

A. Yes, sir.

Cross Examination.

Questions by Defense.

Q. What makes the 11th of July stand out in your memory now?

A. We always close it up at that time.

Q. Isn't it a fact if you sell out your goods earlier, you close earlier?

A. I get my supply Mondays so I am always open on Tuesdays.

Q. Could it reasonably have been on that particular Tuesday you sold out because of a particular rush?

A. I had been sold out on Tuesdays.

Q. And you have closed earlier, even on Tuesday nights?

Law Member. Let's keep it to July 11th. That is the night in question.

Defense. You say that on some Tuesday nights you have closed earlier than 10:30?

Witness. I have been closed, but I have never been closed before 10:30 on Tuesday nights.

Q. How do you figure your goods? Do you apportion a certain amount for each evening?

A. No, I sell the bottled stuff early in the week and finish up on draught. When I finish up the draught, I have done it.

Q. You don't divide up between the 7 days of the week?

A. No.

Q. Then I understand you correctly when you say on Tuesday nights you have never closed your place before 10:30?

A. Only in the winter months, because we are open then from 6 to 10 P. M., but during the summer months we are open from 6 to 10:30.

281 Q. Will you explain to the court what you meant by 10:30? At what time do you call "Time."

A. At 10:30, but I keep my clock fast 10 minutes, so it was really 20 minutes after.

Q. Then everybody is outside of your pub at the real time of 10:30?

A. Yes.

Q. You keep your clock fast 10 minutes?

A. Yes.

The witness was then excused and withdrew from the room.

BOAST, EMILY REBECCA, The Ark, Brantham, England, a British civilian, was called as an additional witness by the Prosecution, was sworn and testified as follows:

Direct Examination.

Questions by PROSECUTION.

Q. State your name.

A. Emily Rebecca Boast.

Q. Where do you live?

A. The Ark.

Q. Where is The Ark located?

A. Brantham.

Q. Are you the owner and proprietor of the Ark?

A. The license holder.

Q. Were you in the Ark public house on 11 July 1944?

A. Yes.

Q. At what time did you close the Ark on the 11th of July 1944?

A. 10:30.

Q. At what time do you call "Time", or did you call "Time", if you can remember, on the 11th of July 1944?

A. Always call it at 10:30.

Q. At what time are the people out of the public house?

A. As soon as they drink up and get out.

Q. And approximately what time would that be?

A. A few minutes after.

282 Q. About how many minutes?

A. Five minutes.

Examination by the Court.

LAW MEMBER. Do you know the private seated the second from your right? (Indicating the accused.)

A. Yes, I have seen him, haven't I?

ACCUSED. I believe you have.

Q. Do you recall him being in your public house on the 11th of July?

A. I couldn't remember that.

Member of COURT. He has been there on many occasions, is that why?

A. On several occasions, yes.

The witness was then excused and withdrew from the room.

KELLY, BERNARD F., 1st Sgt., Hq. 353rd Fighter Group, AAF Station F 157, was called by the Court as a witness, was sworn and testified as follows:

Direct Examination.

Questions by PROSECUTION.

Q. State your name, grade, organization and station.

A. Bernard F. Kelly, Acting First Sergeant, 33191697, Hq. 353rd Fighter Group, Station F 157.

Questions by DEFENSE.

Q. Are you the First Sergeant of the 353rd Fighter Group?

A. Yes, sir.

Q. In connection with that duty, do you supervise the sign-roster?

A. Yes, sir; I do.

Q. Can you tell us what the general procedure is with reference to signing in—concerning the time that members of your organization sign in?

A. They sign in nearest the hour they come in.

Q. Do you mean by that if a boy came in at 11:35, he would sign in 12:00?

A. No, sir; 11:30 probably.

Q. If he came in at 11:10?

A. He would sign in possibly 11:15 or 11:00.

LAW MEMBER. Come in where?

283 DEFENSE. I will cover that.

DEFENSE. (To witness) What would be the procedure if a soldier of your organization came in to the Main Gate at 11 o'clock and then proceeded to the Mess Hall, where he spent some time—which time would he sign in, the time he came into the gate or the time he finally reached the Orderly Room after having been at the Mess Hall?

PROSECUTION. I object. It is purely speculative as to what anyone would do.

DEFENSE. That has been the evidence here and is a proper question.

LAW MEMBER. I think that is correct. He can testify both as to the general practice as you call it and in regard to what instructions there are in force and effect in respect to men signing in.

WITNESS. I would say the men usually sign in at the time they finally turn in. By that I do not mean the time they come to the gate, but—

LAW MEMBER. As of what time? The time they came on the field or the time they actually sign in?

A. I would say at the time they came on the field.

Q. Do you have any directives out in connection with that?

A. No written directives.

Q. Any oral directions or orders?

A. No, sir.

Q. What is the purpose of the book?

A. To see when the men have signed in, or when they have signed in later than they are scheduled to be at the station.

Q. The purpose is to fix the time when they come on the station, not the time they actually sign the book?

A. It is the understanding they sign the book at the time they are coming in.

Q. Coming in where?

A. Turning in for the night. Turning in to their particular unit.

DEFENSE. As a matter of fact, if they come to the gate at one time and spend some time elsewhere, there have been a number of cases where they have signed the book—

PROSECUTION. I object to the question. It is leading.

LAW MEMBER. If he knows, he may answer.

WITNESS. That is true, sir. That has happened before.

LAW MEMBER. The book is kept there for a definite purpose?

WITNESS. That is true.

284 Q. That is to record a time a man checks in?

A. That is correct.

Q: What time is he supposed to ~~be~~ check in that book, according to the orders outstanding: the time he checks in the station or the time he checks in at the Orderly Room.

DEFENSE. Object to that. He has already said there are no written directions; only oral.

LAW MEMBER. Overrule the objection.

LAW MEMBER. (to witness) Tell the court, what is the purpose of the book and what have the men been told with regards to signing in, if they were told anything?

A. We must be in the station by 0100 hours and the men know they must sign in before that hour.

Q. In other words, they must sign when they leave the station and when they come back? It is immaterial to you whether they sign in as of the time they come on the field or the time they check in at the Orderly Room, just so it is before 0100 hours?

A. That is correct, sir.

Q. On 11 July 1944 what was the time limit on your passes? 11:30 or 0100?

A. The pass shows 0100 but our practice has been to stay out until 2400.

Q. Do you issue passes?

A. Yes, sir.

Q. At that time how did your passes read?

A. The reverse side of the Class B reads that the men will not be on the streets after 0100 to 0500 in the morning. That is a mimeographed pass issued by this station.

Q. That was the pass being used on 11 July 1944?

A. Yes.

DEFENSE. At the time you issued those passes, was it your understanding they would not use them after midnight?

A. That is right.

PROSECUTION. Sergeant, isn't it a fact that the passes read "1800 to 0100 hours" as to the times they may be off the post?

A. I don't know the exact wording of it, but they may not be on the streets during 0100 and 0600.

Q. You don't know about the hours of 1800 to 0100?

A. No, sir.

285 Q. Isn't it true that men coming in the Orderly Room sign the time they come in the Orderly Room.

A. I would say they sign in from the time they come in the station.

Q. You wouldn't say they sign in from the time they come in the Orderly Room?

A. No, sir, I wouldn't.

Q. You don't know, one way or the other.

A. For myself, I have come on the station at 11 o'clock and have stayed around the area until 11:30 and have still signed in at 11.

Q. But you don't know one way or the other how the men signed?

A. No, sir; I don't.

The witness was then excused and withdrew from the room.

DEFENSE. The Defense rests.

LAW MEMBER. The court has indicated that the girls who are implicated in this case, having been objects of these alleged attacks, might be present during the summation. The only reason they have been kept out during the course of the trial is the fact that they may have been further called as

witnesses. Before hearing any objections, I wish to say it is the policy of this theater, in furtherance of a desire that British civilians shall sit so that the British civilians can see the proceedings are not a white wash of the accused, if guilty, and interested parties shall be allowed to be present in the court. In furtherance of that policy and in furtherance of what the court believes to be a worth while principle, the court is of the opinion the girls should be allowed to come in during the summation.

DEFENSE. Defense Counsel desires to object most vigorously to the admission of the prosecutrixes of this case during the summation by Counsel. It is the feeling of the Defense Counsel that by virtue of the presence of these girls it very well may come to pass that facial expressions by them during the argument by either the T.J.A. or the Defense Counsel, observed by this court, would tend to influence the court in its decision. Secondly, it is the feeling of the Defense Counsel, by virtue of what very well may be said and may have to be said concerning these girls, it is reasonable to assume there very well may be outbursts by these girls which would not be proper for the court to view. Finally, by virtue of the Defense Counsel's feelings with reference to the alleged crime and the concomitant necessity of the Defense Counsel to speak with reference to the character of these girls, it is the Defense Counsel's feelings he may be restricted by virtue of their presence and I therefore ask the court be closed to them.

The court was then closed and the matter was voted upon. The court was then re-opened. The personnel of the court, prosecution and defense, and the accused and the reporter resumed their seats.

President of COURT. The court has decided that the two girls concerned, the parents of the girls, the Chaplain and the Commanding Officer of the defendant will be admitted during the argument.

The two girls, Sheila Dale and Miriam Cullum, the Chaplain and the C. O. of the defendant were admitted to the court.

286 PROSECUTION. I might say for the record that Constable Felton was advised to tell the Chairman of the Council of the community as to the date of the trial; and also advised the Chairman that the trial was open to British civilians and that they were free to come.

Asst. T. J. A. The British civilians here this morning were also so advised.

PROSECUTION. Prosecution has nothing further.
DEFENSE. Defense has nothing further.
The Prosecution then made a closing argument.
The Defense made a closing argument.
The Prosecution made an argument in rebuttal.

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Note to Reporter. Read carefully all footnotes and instructions on back of Cover Sheet.

If extensive alterations of the printed form are required to make it mark the truth, use a plain sheet of paper and type what actually occurred, using the form as a model to the extent that it is applicable.

(LEAVE THE SPACE ABOVE THIS LINE FOR BINDING)

FINDINGS

Neither the prosecution nor the defense having anything further to offer, the court was closed, and upon secret written ballot ~~two-thirds~~[1] all of the members present at the time the vote was taken concurring in each finding of guilty, finds the accused:[2]

H.J.M.N D.P.G.

Of all Specifications and Charges—Guilty

PREVIOUS CONVICTIONS, ETC.

The court was opened, and the trial judge advocate stated, in the presence of the accused and his counsel, that he had evidence of one previous conviction to submit, which was received without objection and read to the court, and is appended hereto, marked Prosecution's Exhibit 3.[3]

The trial judge advocate then read the data as to age, pay, and service as shown on the charge sheet, and verified by the accused in open court, as follows:

[1] In a proper case (e.g., where the death sentence is mandatory) See A. W. 43a the trial judge advocate should line out this word and enter in its stead, authenticated by his initials, "three-fourths," or "all."

[2] Findings and sentence should be announced and recorded in one of the prescribed forms, or in appropriate combinations or modifications thereof. See pp. 64-65 and 273-274, M. C. M.

[3] In case there are "no" previous convictions, so state, and draw a line through the space after "Exhibit." If objection is made to evidence of previous convictions, or to data read from the charge sheet, the proceedings had thereon will be recorded. This sheet will in that case be used as indicated in the Instructions on the Cover.

Age 33 yrs 4 mos. Pay, $67.00 per month. Allotments to dependents: Class "F", $22.00. Class "E", None per month. Government Insurance deduction, $7.25 per month.

Data as to service: Prior Service: U. S. Navy 11 May 1928 to 11 May 1932 (Character of discharge: Undesirable) Current Enlistment: Enlisted at Syracuse, New York, 2 May 1942 for the duration of war plus six months.

Data as to restraint of accused: Placed in confinement at Station guardhouse, AAF Station F 157, 1080 hrs, 18 July 1944.

SENTENCE

The court was closed, and upon secret written ballot, all

J McN P.G. ~~two-thirds~~ of the members present at the time the vote was taken concurring, sentences the accused:

To be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life.

The court was opened, and the president announced the findings and sentence.

The court then, at 1:55 o'clock, P. M., 26 August, 1944, ~~proceeded to other matters~~ adjourned to meet at the call of the president.

Examined by Defense Counsel before authentication, per par. 45 b, M.C.M.
(Initials of Def. Counsel) WK

AUTHENTICATION

HARLEY J. MCNEAL,	DONALD P. GRAUL,
Captain, J.A.G.D.,	Colonel, Sig C,
Trial Judge Advocate.	*President.*

C.M. Form 18—Record of Trial, G.C.M.

Hq SOS 2-43 5M 6304

HEADQUARTERS
VIII FIGHTER COMMAND
Office of the Commanding General
APO 637 AAF Station F 341

20 September 1944

In the foregoing case of Private Bernard W. Smith, 32286877, Headquarters Detachment, 353rd Fighter Group, the sentence is approved. The United States Penitentiary at Lewisburg, Pennsylvania, is designated as the place of confinement. Pursuant to Article of War 50½ the order directing the execution of the sentence is withheld.

FRANCIS H. GRISWOLD,
Brigadier General, U. S. Army,
Commanding.

Prosecution's Exhibit 3

Note: Include only such evidence as is admissible in this case. See rule in footnote.

(LEAVE THE SPACE ABOVE THIS LINE FOR BINDING)

EVIDENCE OF PREVIOUS CONVICTIONS

in case of

Smith	Bernard W.	32286877
(Last name of accused)	(First name and middle initial)	(Army Serial No.)

Pvt.	Hq. Det. 353rd Fighter Group.
(Rank)	(Organization)

Date of current enlistment : 2 May 1942
Date of offense here charged : 11 July 1944
Dates AWOL during current enlistment : 13 Sept to 21 to Oct. 1942
1 Jan to 9 Feb. 43.
2 April to 14 April 1943.

(EXTRACT COPY OF SERVICE RECORD OF ACCUSED)

RECORD OF TRIALS BY COURTS MARTIAL

Special C.M. 61st A.W. Date of offense: 2 August, 1943.
Synopsis of specifications: AWOL from his Station from August 2 to August 7, 1943.
Sentence or acquittal announced and adjudged 14 August, 1943.

Sentence as approved: Confined hard labor for six (6) months and forfeit $25.33 of his pay for six (6) months.

Approved 14 August, 1943.

I certify the above is correct.

HOWARD C. WIENER, JR.,
1st Lt. Air Corps, Adjutant.
(Name, grade and organization)

..... C.M. ..... A.W. Date of offense ....., 19...

Synopsis of specifications: .....

.....

Sentence or acquittal announced and adjudged ....., 19...

Sentence as approved: .....

.....

..... Approved ....., 19...

I certify the above is correct.

.....
(Name, grade, and organization)

..... C.M. ..... A.W. Date of offense ....., 19...

Synopsis of specifications: .....

.....

Sentence or acquittal announced and adjudged ....., 19...

Sentence as approved: .....

..... Approved ....., 19...

I certify the above is correct.

.....
(Name, grade, and organization)

I certify that I am the official custodian of the Service Record of the above named accused, and that the above RECORDS OF TRIALS BY COURTS MARTIAL are true extract copies of all entries therein relating to previous convictions which may properly be admitted in evidence in this case.

The above true copies of the record of 1 previous convictions made in 1 sheet at AAF Station F-157 this 19th day of July, 1944.

ERNEST P. MACGREGOR,
(Name typed)
CAPTAIN Hq. Det. 353rd Fighter Gp.
(Rank) (Organization)

Note—Evidence of previous convictions must relate to offenses committed during the current enlistment of the accused and within one year preceding the commission of the offense here charged, time absent without leave excluded.

For more complete statement of this rule, and for the rule as to previous convictions of persons other than enlisted men, including general prisoners, and as to the proper form of evidence of convictions, see paragraph 79c, (p. 66), M. C. M.

If there are more previous convictions than provided for above, line out the certificate (by a single diagonal line from upper left to lower right) and enter thereunder "Continued on next sheet." Line out in the manner any part of the form above the certificate (on the last sheet) which is not filled in.

8—Evidence of Previous Convictions

Hq SOS USAPP 10-43-25M-16052

290 *Prosecution's Exhibit 1*

Skirt belonging to Sheila W. Dale:

Plaid material: having several pleats down the front, also a strain on the back.

291 *Prosecution's Exhibit 2*

Knickers belonging to Sheila W. Dale:

Pale blue rayon knickers—having a strain on the fork.

292 STATEMENT OF SHEILA WINIFRED DALE. N.R.I.C. TXKK. 65, Factory Hand, age 20, of Victoria Cottages, Station Road, Lawford. States on 12.7.44:

At 8.45 pm on Tuesday, 11th, July, 1944, I returned from Ipswich to Manningtree by train. I was with my sister Rita. We walked home from the station. I stayed at home and at 9.20 pm. my sister Pam came in with two American soldiers who I know as Kentucky and California. I do not know their proper names. They stayed in the house until about 10.30 pm. when Pamela and I decided to cycle as far as Bergholt with them. When we got to Bergholt we all stopped. We separated and I went along the road with Kentucky

for about 50 yards and stood talking to him. After about 10 minutes my sister shouted out to me that she was going home and shortly afterwards the soldier California went passed riding his cycle. I left Kentucky and started to ride home. While I was with Kentucky I had no sexual relations with him and never have.

Just before I got to the Bucks Horns P.H. Brantham I saw an American soldier riding a cycle towards Bergholt. It was getting dark and I was walking as I had no lamps. As the soldier got near me he said, "Are you going home how far are your going?" I did not answer him. He then turned round and cycled slowly beside me. He got off near the brick bridge near the river and said, "How much further have you got to go?" I said. "Not far". He said, "Manningtree?" I said, "Yes". He then said, "You have got to stop here". I said, "I am not going to stop". I could smell he had been drinking. To get away from him I got on my cycle and rode along the Ipswich Road towards Manningtree Railway Station. He started to cycle beside me and said, "I am going to see you home".

When we got to the footpath which leads from the Ipswich Road into Station Road he said, "You can take a short cut that way". I said "No, I cannot get home that way". About 100 yards further down the road he said, "You have got to stop here whether you like it or not". He got off his cycle and shook the handle-bars of my cycle. I fell off and the soldier dropped his cycle in the road. He threw mine in the long grass beside the road. He then put his cycle in the grass.

I started to run away, he ran after me, and pulled me onto the grass and pushed me down. I said, "If you don't let me go my father will come along in a minute." I made more excuses to try to get away and said, "The grass will spoil my clothes". He said, "I will take me coat off". I then managed to get up and ran away screaming. He ran after me and pushed me down again. He put his hands around my neck and said, "If you don't shut up I will murder you. I am not going to hurt you". He pulled my skirt up and tried to pull my knickers off. I struggled and screamed but he managed to pull them off one leg. He put one hand over my mouth and pulled one of my legs apart.

He laid on that one and pulled the other one open. He put his mouth on my private parts and I could feel him sucking me. All the time I was trying to get away and screaming. He did this for some time. He then stopped and laid on top of me. I screamed and said "I will see you another night". He would not let me go. I then felt his person being put in my private parts. I cannot remember seeing him take it out of his trousers. I started to scream again and he said, "If you don't stop screaming I will hurt you more". He then started saying "Fucking lovely cunt". During this time he was moving up and down on top of me and I could feel his person moving in my private parts. After
293 a while he got off and I could feel some fluid on the top of my legs and private parts.

The soldier got up and buttoned his trousers and coat up. I did not see his person. I got up and pulled my knickers up and my skirt down. I said, "Will you get my cycle?" He went and got it and said, "Do you want me to see you home?". I said, "No, I will go home alone". He said, "Will you see me again?" I said, "Yes", so that I could away. He said "Will you make it Thursday?" I said "What time?" He said, "Seven o'clock on the bridge over there, make it the second bridge."

He then let me go home and on the way I did not pass anybody. I got indoors just after twelve. I have never seen this soldier before. He was about 5'10", fair hair, round faced, American soldier's uniform, no hat, teeth widely spaced, with some missing at the top left. I feel sure that I could recognize him again. I cannot describe his cycle. It is not the first time a man has had intercourse with me. When I got home, I complained to my mother.

At 7.15 p.m. on Tuesday 18th July, 1944, I attended an identification parade at Raydon Aerodrome. I picked a man out, who was paraded with fifteen other men, as the one who had assaulted me on Tuesday 11th July, 1944. I had not seen this man between the day of the assault and the identification parade.

s/

D. J. Felton (Witness) (Signed) S. W. Dare.
P. c. 305, Mistley.

Original statements in the pocket book of P. c. 305 Felton, Pages Nos. 112-119, and 141, taken at 10.30

am. 12.7.44, at Dr. Beckett's Surgery, Manningtree, and at 7.45 pm. 18.7.44. at Raydon Aerodrome, respectively.

CERTIFIED TRUE COPY.

E. W. SHEPHERD,
Detective Sergeant.

A TRUE COPY.
/s/ ALAN B. TODD,
1st Lt. Inf.

CERTIFIED A TRUE COPY
HARLEY J. MCNEAL,
Captain, JAGD,
Asst. Staff Judge Advocate.

294 *Court's Exhibit 1*

PASS SHEET

SIGN OUT				SIGN IN		
Date	*Time*	*Name*	*Destination*	*Date*	*Time*	*Name*
7/11/44	1800	Kuttner	Local	7/11/44	2300	Kuttner
7/11/44	1800	Guest		7/11/44	2300	Guest
7/11/44	1800	Frazier	Local	7/11/44	2400	Frazier (Bfk)
7/11/44	1800	Simpson	Local	7/11/44	2350	Simpson
7/11/44	1840	Smith	Local	7/11/44		
		Henderson		2300	2300	Smith
9/12/44	1800	Ipswich	Ipswich	7/12/44	2300	Henderson
9/12/44	1800	Buhrer	Local	7/12/44	2300	Buhrer
				7/12/44		
7/12/44	1800	Feller		2340	2300	Feller
7/12/44	1830	Paris	Local	7/12/44	2315	Paris
7/12/44	1830	Simpson	Local	7/12/44	2000	Simpson
7/12/44	1830	Wozniak	Local	7/12/44	2330	Wozniak
7/12/44	1830	Streb	Local	7/12/44	2300	Streb
7/12/44	1830	Czytyrbok	Local	7/12/44	2300	Czytyrbok
7/12/44	1930	Chiaramonte	Local	7/12/44	2330	Chiaramonte
7/12/44	1930	Scaible	Local	7/12/44	2300	Schaible
7/12/44	1930	Meisberger	Local	7/12/44	2350	Meisberger
7/12/44	1930	Davis	Local	7/12/44	2400	Davis

A TRUE COPY
ERNEST P. MACGREGOR,
Captain, Air Corps.

295 *Defendant Exhibit B*

STATEMENT OF MIRIAM FLORENCE CULLUM, aged 19 years, No. 57, Colchester Road, Lawford Armament Worker, who saith:

At 10.40 p.m. on Tuesday 11th July, 1944, I left my boy friend's mothers house a Brantham to return to my own house at Lawford. I was accompanied by his sister, Mrs. Stella Kerry, who was going to walk part of the way home with me. I had my cycle. As we reached the corner just before Brantham Hall, an American soldier passed us on a cycle going in the direction of Ipswich. He did not speak to us. When we reached the entrance to the new village, near the school, the same American came from behind and started to cycle beside us. He said, "Good evening, girls". We never answered him. He then said to me, "Who is your girl friend?" I never answered him but, Mrs. Kerry said "No, good night". Two special constables, then passed going up the hill and he said "Goodnight" to them.

By that time we had almost reached the Ark P.H. When Mrs. Kerry said, "No, Goodnight", the American cycled on towards the Crown P.H. She then said "Goodnight" to me, turned round and went home. I got on my cycle and started to come home.

When I reached the Crown P.H. I passed the American who had stopped near the kerb. When I got half way between the two bridges, the soldier caught me up and said "Hullo, again. Can I see you home". I did not answer him. He said "Please". I said "No, thank you". He said "Why, won't you speak to me?" I said "I don't talk to strangers".

We had almost reached a small bridge near a cottage, when he said, "You are not going any further". He turned the front wheel of his cycle into my front wheel and turned the handlebars of my cycle. I fell off and struck my head on a telegraph pole. My cycle fell half on the road and half on the grass. Before I could get up, he pulled me across the road and tried to drag me into a corn field. I pulled his hair, screamed, and kicked him. He let me go and as I fell down he tried to kick me. His foot caught my back. He also hit me with his fist on the head. As he dragged me across the road, he said "You've had it. I am going to fuck you". He repeated this a number of times. I screamed again and he put his hand over my mouth and said "Shut up". I bit his right hand and he caught me around the throat. I screamed and kicked him. He looked over my shoulder and let go of my throat. I ran across the road, he followed me and pushed me onto my cycle. He

pick his cycle up and rode off towards Brantham. Two men then came along from the direction of Brantham. They were a soldier and a civilian who I know as Frank Welham. They saw that I was crying and said, "Is he the Yank?" and I said, "Yes" and told them what had happened. The soldier came home with me.

When I got home I complained to my parents of having been assaulted by an American soldier. The soldier was about 25 years old, 5'9"-10", fair hair, parted on left, round face, teeth spaced with some out at the top left, staring eyes, wearing side hat, American soldier's uniform, no stripes, brown boots or shoes, riding an upright cycle, khaki colour. I could identify him again.

At 7:15 p.m. on Tuesday 18th July 1944 I attended an identification parade at Raydon Aerodrome. I picked a man out of fifteen others as the one who had assaulted me on the 11th July, 1944. I have not seen this man between the time of the assault and the identification parade.

s/ D. J. Felton (Witness) (Signed) Miriam Cullum.
P.c. 305, Mistley.

296 *Government's Exhibit No. 2*

Not formally identified and marked by the Reporter at the time of trial but handed to the Court. Is now identified as Government's Exhibit No. 2 and filed with the Clerk of the Court at Lewisburg, Pa.

Official Court Reporter.

Filed:
Jul 1 1947.
Per F. H. Campion, Clerk

297 UNITED STATES OF AMERICA
WAR DEPARTMENT

Washington, 22 January, 1947

I HEREBY CERTIFY that I am the Adjutant General of Army and that the attached two (2) page document is a true and correct photostatic copy of W.D. A. G. O. Form No. 170, "Application for Appointment and Statement of Preferences for Reserve Officers," pertaining to Harry Lieberman, O-1551668, the original of which is on file in my office.

Edward F. Witsell.
Major General
The Adjutant General

I HEREBY CERTIFY that Major General Edward F. Witsell, who signed the foregoing certificate, is the Adjutant General of the Army, and that to his certification as such full faith and credit are and ought to be given.

IN TESTIMONY WHEREOF, I, ROBERT P. PATTERSON, Secretary of War, have hereunto caused the seal of the War Department to be affixed and my name to be subscribed by the Deputy ~~Assistant~~ Administrative Assistant of the said Department, at the City of Washington, this twenty-second day of January, 1947.

(SEAL)

ROBERT P. PATTERSON
Secretary of War.
By JAMES C. COOK
~~*Assistant*~~ *Administrative Assistant,*
Deputy

War Department
Form No. 7

298 *Application for Appointment and Statement of Preferences for Reserve Officers*

(See instructions on back)

From: Lieberman Harry (NMN)
(Last name) (First name) (Middle name)

Date July 8, 1942

To: The Adjutant General, Washington, D. C.
(Through Corps Area or Department Commander)

I hereby make application for appointment as Second Lieutenant Ordnance in the Officers' Reserve Corps.
(Grade) (Section)

In connection with the application I submit the following information, which I certify to be correct to the best of my knowledge:

1. Permanent address: 5823 Beacon Street
   Pittsburgh, Penna.
2. Date of birth: Aug. 18, 1908 White or colored: White
   (Month) (Day) (Year)
3. Place of birth: Imperial, Penna.
4. State whether or not you are a citizen of the United States and whether by birth or naturalization. (If the latter, append evidence of naturalization, or if evidence not available, state on what date and in what court naturalized.)
   Yes By birth
5. Married or single: Single
6. Number of minor children: None

7. Name of nearest relative, giving relationship and address, including street and number:
Lizzie Lieberman Mother
5823 Beacon Street
Pittsburgh, Penna.

8. Father's name†: Lieberman Simon (NMN)
(Last name) (First name) (Middle name)
Father's address: Deceased
(Number and street, or rural route)
(City, town, or post office) (State or country)
Father's birthplace: Russia
If of foreign birth, state whether or not naturalized. (If naturalized, state on what date and in what court.)
Yes, date and court unknown.
Mother's name†: Lieberman Lizzie (NMN)
(Present last name) (First name) (Middle name)
Mother's address†: 5823 Beacon St.
(Number and street, or rural route)
Pittsburgh Penna.
(City, town, or post office) (State or country)
Mother's birthplace: Russia

9. Marksmanship, giving year of qualification:
Rifle: None
Pistol: None

10. Languages:

	French	*Spanish*	*German*	*Other*	*Other*
Speaks fluently					
Speaks fairly		None			
Translates					
Reads					

11. Special knowledge, professional or other: Law
12. Present occupation, years of experience in same and name and address of employer, if any: Until Mar. 10/42 practiced law ten years
13. Experience in other lines and years of same: Wholesale shoe business—advisory capacity—six years
14. Schools attended, other than graded schools, including service schools:

Name of school	*Number of years attended*	*Graduated? Yes or No*	*Year*	*Degrees*
Univ. of Pgh.	4	Yes	1928	B. S.
Univ. of Pgh. Law School	3	Yes	1931	LL. B.

Subjects specialized in: Business Administration Law

15. Campaigns and battles participated in (give dates): None

16. Decorations, citations, and commendations (attach copies): None

17. Wounds, giving date and place of occurrence: None

18. State membership in professional societies: None

19. Are you at present a member of the Regular Army, Enlisted Reserve Corps, or federally recognized in the National Guard? If so, state which, giving grade and organization or arm or service and date of expiration of enlistment: Member of Regular Army. Private in 631st T. D. Bn. Duration & six months.

20. Chronological statement of service in the Army, Navy, Marine Corps; including service as a cadet at U. S. Military or Naval Academy, National Naval Volunteers, National Guard in Federal service, as a Reserve officer on active duty, or at military training camps, or as a contract surgeon serving full time, or as a student in the C. M. T. C. or R. O. T. C., Basic Course, Advance Course, and Advanced Course camp, giving inclusive dates for each by day, month, and year.

From	To	Station	Grade	Organization	Duty	Full name and grade of immediate commanding officer
3/10/42	5/16/42	Camp Bowie	T Pvt	631 T. D. Bn	Basic Training	Eugene A. Laprant Capt. F. A.
5/16/42	7/ 8/42	Camp Bowie	T Pvt	631 T. D. Bn	Radio School	Bernie D. Johnson 1st Lt F. A.

21. Were you ever rejected for any branch of the military service: No or for the R. O. T. C. No or C. M. T. C. No? If so, state when and where rejected and cause: .....

MILITARY SERVICE OTHER THAN ABOVE

22. Service in Officers' Reserve Corps (inactive); National Guard of the United States; Enlisted Reserve Corps (inactive); Naval or Marine Corps Reserve Forces

* In giving the names of the father or mother, if either is deceased, it will be noted following the name.

† In giving the mother's last name, that which she bears at present will be given.

‡ If the mother's address is the same as the father's, it will be so noted and not repeated.

(inactive); National Guard or Naval Militia not in Federal service, or in military or naval forces of foreign countries: None

23. Prior service in Coast Guard, Public Health Service, or Coast and Geodetic Survey: Give dates and nature of service. None

24. Have you ever been convicted by a civil or military court? If so, give the date and circumstances. No

REMARKS.—State any other information you may desire to submit for consideration: None

(Signature—Sign all names in full)

HARRY (First name) (Middle name) LIEBERMAN (Last name)

(Name typed) HARRY LIEBERMAN, Pvt.

INSTRUCTIONS

1. Fill out on typewriter, if practicable; if not, print proper names and write clearly. This form must be executed IN DUPLICATE and both copies forwarded through the corps area or department commander to The Adjutant General. EACH COPY MUST BE SIGNED.

2. Applications will be accompanied by a Report of Physical Examination (W. D., A. G. O. Form No. 63), which may be obtained from any military post or station. Physical examination should preferably be by a medical officer of the Regular Army, Officers' Reserve Corps, National Guard, or Public Health Service. If applicant so desires, the examination may be made by a reputable private physician.

3. If the applicant is in the military service, application will be forwarded through military channels.

4. If appointment is sought with a view to assignment to a particular unit of the Organized Reserves, that fact will be stated under "Remarks."

5. Under "Remarks" make appropriate explanation, when other allotted spaces are insufficient, and any statement you may wish to make with regard to your preference for duty and any recommendation which you may have received for promotion, giving full name and grade of recommending officer.

6. Under "Chronological Statement of Service" state duty specifically, as "regimental adjutant," "company commander," etc., NOT in general terms, as "regimental duty," "staff duty," etc.

301 In the District Court of the United States
For the Middle District of Pennsylvania

In the Matter of the Application for a Writ of Habeas Corpus by BERNARD W. SMITH	No. 199 Habeas Corpus

Opinion and Order of Court—August 7, 1945

This habeas corpus proceeding is instituted by Bernard W. Smith, a military prisoner at the United States Peni-

tentiary, Lewisburg, Pennsylvania, who was convicted by a General Court-Martial on two charges involving violations of the 92nd and 93rd Articles of War.[1] The first involved the carnal knowledge of one Sheila Winifred Dale, a British girl, twenty years of age, on July 11, 1944; the second charge involved an assault with intent to commit rape upon one Miriam Florence Cullum, a British girl, nineteen years of age, on the same date and within a period of less than one-half hour prior to the offense set forth in the first degree. Both violations occurring in the same general vicinity on what is known as Ipswich-Manning Tree Road, Lawford, Essex, England.

302 Petitioner has alleged numerous errors which he seeks to set up as denials of due process. All the matters raised by him may be summarized in four basic contentions as follows:

1. That the trial court under the evidence should have found him "not guilty".
2. Incompetency of Counsel.
3. That the pre-trial investigation under Article of War 70 was conducted in such a manner as to deprive the General Court-Martial of jurisdiction of the petitioner.
4. That matters occurring in the course of the trial including the improper admission of evidence and the unexplained absence of a witness deprived the Court of jurisdiction and rendered his conviction void.

Counsel for the petitioner sought in this proceeding to review the entire testimony had before the trial court, to point out discrepancies between the testimony of witnesses for the prosecution and the defense and (on the basis of his contention that the trial court should have believed all of the witnesses for the defense and not the witnesses for

[1] "CHARGE I: Violation of the 92nd Article of War.

"Specification: In that Private Bernard W. Smith, Headquarters Detachment 353rd Fighter Group did at Ipswich-Manning Tree Road, Lawford, Essex, England, on or about 11 July 1944 forcibly and feloniously, against her will, have carnal knowledge of Sheila Winifred Dale age 20, Victoria Cottages Station Road, Lawford, Essex.

"CHARGE II: Violation of the 93rd Article of War.

"Specification: In that Private Bernard W. Smith, Headquarters Detachment 353rd Fighter Group did, at Ipswich-Manning Tree Road, Lawford, Essex, England, on or about 11 July, 1944, with intent to commit a felony, viz., rape, commit an assault upon Miriam Florence Cullum, 57 Colchester Road, Lawford, Essex, England, by willfully and feloniously dragging her from the highway into a field, hitting her with his fist on the head, taking hold of her throat with his hands and kicking her in the back with his foot."

the prosecution) now contends that the trial court erred in finding the petitioner Smith guilty. There was no proof of any deliberate deception or suppression of evidence by the prosecution. Smith's position here is that the prosecution witnesses should have been disbelieved, that his witnesses as to alibi should all have been believed and that on that basis he should have been acquitted and that this Court should not hold that the prosecution's witnesses were not telling the truth.

Whether or not a witness in the trial of a case committed perjury is not in and of itself the basis for habeas corpus.[2]

303 It was for the trial court to decide whether it would believe or disbelieve certain testimony and to determine what weight it would give to any portion of the evidence. It is not the function of this Court in a habeas corpus proceeding to reevaluate the evidence from the cold record, without the benefit of seeing and hearing the witnesses, and to decide whether or not it would have disagreed with the findings of the trial court. The Supreme Court has always recognized that this is not a function of the Court in a habeas corpus proceeding and only recently in connection with a habeas corpus involving a military trial has reaffirmed this principle.[3]

However, by reason of the other matters raised by petitioner, we have carefully reviewed the entire Court-Martial record. Miriam Cullum testified to facts which showed a rather brutal assault with the expressed intention of committing rape. Its culmination was only prevented by the timely arrival of one Carter, a British Corporal, and a civilian. They found her on the ground, crying, and in a shaken nervous condition. Her legs were bruised and her neck was bruised and swollen for several days. The time was fixed at approximate 11:00 o'clock P. M. Sheila Dale, the other victim, testified to being dragged and thrown to

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[2] Hodge v. Huff, (C. A. D. C.) 140 F. 2d 680, cert. den. 322 U. S. 733; Long v. Benson, (CCA 6) 140 Fed. 2d 195.

[3] The Supreme Court *In Re* Yamashita 327 U. S. 1, 8, 66 S. Ct. 340, 343, said "We also emphasized in *Ex parte* Quirin, (317 U. S. 1, 63 S. Ct. 2, 87 L. Ed. 3) as we do here, that on application for habeas corpus we are not concerned with the guilt or innocence of the petitioner. * * * The courts may inquire whether the detention complained of is within the authority of those detaining the petitioner. If the military tribunals have lawful authority to hear, decide and condemn, their action is not subject to judicial review merely because they have made a wrong decision on disputed facts. Correction of their errors of decision is not for the courts but for the military authorities which are alone authorized to review their decisions. * * *"

the ground and attacked. She arrived home in a hysterical condition. An American soldier who was visiting in a nearby house, was called and testified to her condition, that her blouse was open, and that there were dirt marks on her clothing. There was medical testimony that her right thigh, left arm and left knee were bruised. Each girl, independently, and without any information from the other, gave descriptions of their attacker which tallied closely with Smith's appearance.[4] At a line-up of twenty soldiers a week or so later each girl was separately taken from a room to walk past the line-up and without any assistance from the other, immediately and unhesitatingly pointed out Smith as the attacker. They again positively identified him at the trial. The last attack occurred about five miles from the Post. The time of the attack was necessarily an approximation and estimated as being around 11:30 to 11:45 o'clock P. M. The defense was an alibi that Smith had reached the Post at 11:30 o'clock P. M. But the testimony of his witnesses as to time also consisted of approximations which may be best exemplified by that of a soldier named Pagtyka who was joined by Smith on the way back to the Post. He had been at various "pubs", the last one being the "Bucks Horn", "loafing around and drinking"[4] and was "feeling high".[5] On direct examination he testified that he was there until 10:00 o'clock drinking beer with a few girls, then went on his cycle with one of the girls to the first bridge, and stayed about fifteen to twenty minutes and then went home. Also as to the time of leaving he stated "It was a little after 10 because I took a little time finishing my beer." That he left this girl "about 25 after ten" and "Then I was on my way home and then met up with Smith" on his cycle about three quarters of a mile farther on. They stopped on the way and had a smoke "about five minutes" and reached the gate "near 11:30". He also stated that he met Smith "about 25 minutes after 10", then after being reminded of the three quarters of a mile traveled after leaving the girl he estimated the time at "about a quarter to 11." On cross-examination he estimated the time with the girl at "about 20 minutes" and that it could have been longer and finally that it could have been close to midnight when he reached the Post. On examination by the court he fixed the time of getting his last beer at 10:00 o'clock because the woman at the "Bucks Horn" called

[4] Court-Martial Record page 187 (Trial Testimony page 124).
[5] Court-Martial Record page 189 (Trial Testimony page 126).

"Time." He admitted he did not look at a clock, and also that he did not know whether this particular "Pub" closed at 10 or 10:30. Significant was his statement that Smith told him "* * * he had a girl that night", although Smith in his testimony said he had visited a number of "Pubs", that he was drinking, but made no mention whatsoever of being with a girl.

Of Partyka's testimony Counsel for petitioner naively comments, "He met the petitioner on the way back to camp that night at 10:45; at that time he was bicycling up the hill; Partyka caught up with him and rode into camp with him. Other than a short stop for a smoke they continued to the camp without stopping and came in Gate 2 and reached that gate at 11:30" * and states further, "We find Smith's entrance into camp, at about 11:30, corroborated by Partyka. * * *"

Certainly, there are few records which when searched with a fine tooth comb will not yield some debatable rulings of law or admission of evidence and if this could be done in habeas corpus there would be no end to litigation and the time of the courts would be occupied in useless and futile speculation. The pronouncement of the Supreme Court in Glasgow v. Moyer, 225 U. S. 420, 429; 56 L. Ed. 1147; 32 S. Ct. 753, that "* * * The principle of the cases is the simple one that if a court has jurisdiction of the case the writ of habeas corpus cannot be employed to re-try the issues, whether of law, constitutional or other, or of fact."

306 is still a salutary rule. Certainly here the eight members of the trial court with the benefit of observation of the witnesses were in a better position than this court to arrive at the correct result. Moreover, on the record before us, there would be no inclination to disagree with the verdict at which they arrived. The trial record shows a careful impartial trial, and the Board of Review made an exhaustive and careful study of both the law and the facts of the trial.

We are next concerned with the usual allegation of competency of assigned counsel, the petitioner alleging that he did not have adequate representation. Military Law is due process of law to those in the military or naval service and for proceedings before Courts-Martial a commissioned officer is competent counsel.

* Page 3 of Petitioner's Brief
† *Ex parte* Benton (D. C. Cal. 1945) 63 F. Supp. 808
‡ Altmayer v. Santgrad (CCA 5) 148 F. 2d 161

The special orders dated August 9, 1944, designating the members of the court in petitioner's case, also appointed for him a defense counsel and assistant defense counsel.[3] In addition the record[4] shows that Smith was given an opportunity to introduce civil or military counsel of his own selection and accordingly did introduce as Associate Counsel one 2nd Lt. Harry Lieberman, although electing to also retain the services of the appointed Defense Counsel and Assistant Defense Counsel.[5] Lieber-307 man, the selected counsel, was a law school graduate with ten years experience in the practice of law.[6] The appointed Assistant Counsel was "* * * a graduate of Notre Dame Law School and admitted to practice in Washington."[7] Whether or not the other appointed Counsel was an attorney does not appear. Whether any of the specific guarantees of the 5th and 6th amendments relating to criminal prosecutions apply to petitioner in military trial[8] need not be decided here since the remaining questions may be fully disposed of, giving the petitioner the benefit of the principles as applied to criminal prosecution in the Civil Courts. That he had counsel of his own choosing might well dispose of this question, but the reflection cast upon counsel, including appointed counsel calls for consideration. The burden of proving such incompetency is upon petitioner.[9] He has introduced no evidence other than the trial record and his own lay conclusion. Even had the record shown carelessness of counsel or a failure of counsel to object to the introduction of evidence, or errors in their advice, it would not rise to that plane where it would constitute a ground for habeas corpus.[10] Nor does

[3] Special Order No. 105, dated August 9, 1944, (Page 64 of the Court Martial Record) appointed Captain William Kajelman as Assistant Defense Counsel and 1st Lt. Frederick M. Crollard, Jr. as Assistant Defense Counsel. This procedure was in accord with the requirements of Article of War 11 (U. S. C. A. 1482).

[4] Page 66 of Court-Martial Record.

[5] Page 66 of Court Martial Record. The Trial Court's preliminary action complied with Article of War 17 (10 U. S. C. A. 1488).

[6] Respondent's Exhibit No. 2.

[7] Transcript of Testimony page 42.

[8] See discussion *Ex parte* Bestoge, *Supra*.

[9] Walker v. Johnston, 312 U. S. 275, Bostic v. Rives, 107 F. 2d 649, cert. den. 309 U. S. 664, Boehman v. Green, 130 F. 2d 804, Achtien v. Dowd, 117 F. 2d 989.

[10] Diggs v. Welsh (U. S. App. D. C.) 148 F. 2d 667, Dorsey v. Gill, (App. D. C.) 148 F. 2d 857, para. 49—Andrews v. Robertson (C. C. A. 5) 145 F. 2d 101, cert. den. 65 S. Ct. 1013, 324 U. S. 871.

the Constitution guarantee the assistance of the most brilliant counsel. To entitle petitioner to relief on this
308 ground there must be such a neglect of duty . . .
as to make the trial itself 'offend those canons of decency' which constitute due process of law.",[18] or an extreme case which would make the proceedings "a farce and a mockery of justice."[19]

Petitioner's counsel, with the benefit of having before him the typewritten copy of the entire testimony, and with an opportunity to carefully analyze the same, and with a knowledge of the very last witness's testimony, points out instances where he, had he been trying the case, would have put some additional questions to some of the witnesses, or objected to some of the testimony. Counsel in the actual trial of a case and with a background of information not appearing in the record, may well, in the exercise of good judgment, deem it wise to refrain from asking certain specific questions or refrain from objecting.[20] Moreover, an examination of the trial record convinces this Court that the petitioner was most ably, competently, and vigorously represented and defended.

Petitioner alleges that the investigation under Article of War 70 (10 U.S.C.A. 1542) was conducted in such a manner as to deprive the General Court-Martial of jurisdiction. Petitioner's position is that the requirements of Article of War 70 are all jurisdictional and any deviation would *per se* render any subsequent proceedings void.

It has been aptly said that "It was no part of the purpose of the authors of Article of War 70 to prevent the trial,
309 conviction and punishment of a guilty man."[21] and Article of War 37 (10 U.S.C.A. 1508)[22] as a guide for reviewing and confirming authorities provides as to Courts-Martial that errors complained of must have "injuriously affected the substantial rights of an accused"

[18] U.S. *Ex Rel* Mitchell v. Thompson (D.C. N.Y.) 56 Fed. Supp. 683

[19] Strong v. Hunt (C.C.A. 10th) 148 F. 2d 692

[20] Diggs v. Welch, *supra*

[21] Bostic v. Rives, *supra*

[22] Court-Martial 290477, Lloyd (1943) 17 Board of Review 153, 159

[22] Article of War 37 (10 U.S.C.A. 1508) provides: "The proceedings of a court-martial shall not be held invalid, nor the findings or sentence disapproved, in any case on the ground of improper admission or rejection of evidence or for any error as to any matter of pleading or procedure unless, in the opinion of the reviewing or confirming authority, after an examination of the entire proceedings, it shall appear that the error complained of has injuriously affected the substantial rights of an accused . . ."

Petitioner alleges that Lt. Todd was "the originator of the charges and the accuser in fact," and "ineligible to be the impartial investigator under the 70th Article of War."

The formal charges were preferred by Captain MacGregor, the accused's immediate Commanding Officer.[23] The attacks had been reported to the British Police and they had conducted a preliminary investigation and interviewed witnesses with the assistance of several agents assigned by the Criminal Investigation Division, U. S. Army.[24] Lt. Todd as Provost Marshal of the Army Base or "Field", first knew about the matter between the 16th and 18th of July, when visited by two British Constables,[25] and made available to them the lists of names to locate soldiers who had been in that vicinity, including a "fellow by the name of Smith." He called in some suspects, including
310 Smith, for interviews.[26] The British Constable examined Smith's hand for tooth marks.[27] Subsequently Lt. Todd participated in arranging a line-up of fourteen soldiers, to ascertain whether the girls identified any suspect, including Smith.[28] Whether Lt. Todd participated as Provost Marshal prior to or as investigator subsequent to his designation is immaterial. It was a proper part of an impartial investigation.[29] The Record shows that as Investigation Officer, Lt. Todd advised Smith of his rights, informed him of the statements of witnesses, called every witness Smith requested, permitted Smith to interrogate any witnesses he desired, and conducted a fair and impartial investigation under Article of War 70.[30] This

[23] Court-Martial Record pages 32 to 34.

[24] Report of C. I. D. in Court-Martial Record, pages 38 to 40.

[25] Transcript of Testimony, page 36.

[26] Transcript of Testimony, page 37.

[27] Transcript of Testimony, page 93.

[28] Transcript of Testimony, pages 37 and 38.

[29] It also appears that Smith consented to the line-up; Lt. Todd's Testimony, Transcript of Testimony, pages 38 and 39; Smith's Testimony, Transcript of Testimony, page 32.

[30] Court Martial Record, pages 42 to 54.

While the Court-Martial Record cannot be collaterally attacked—Givens v. Zerbst, 255 U. S. 11, Ridlle v. Dyche, 262 U. S. 333, 43 S. Ct. 555, L. Ed. 1069; Hill v. U. S. *Ex. Rel.* Wampler, 298 U. S. 460, 56 S. Ct. 760, 80 L. Ed. 1283; Smith v. Hiatt, (D. C. M. D. Pa. 1944) 54 Fed. Supp. 481; Spann v. Zerbst, (CCA 5) 99 F. 2d 330; Farnsworth v. Zerbst, (CCA 5) 98 F. 2d 541, there was not in any event any evidence before this Court which would have justified any contrary conclusion. After hearing and seeing the witnesses this Court would accept Lt. Todd's testimony on this matter. Neither does Hellinger's testimony negative it.

was all that Smith had a right to ask. He was not deprived of any substantial right.[31] At the opening
311 of the trial he was also given full opportunity to object to proceeding with the trial.[32]

Petitioner contends that the line-up at which he was identified was unfairly conducted,[33] and that the British Constable at his interview had no right to look at his hand for tooth marks, and that these matters constituted compulsory self-incrimination.[34]

312 Petitioner proceeds on the theory of an involuntary confession. The girls at the trial again positively identified him, and his hand was available for examination at the trial. Consequently, even though consider-

[31] Smith was even given a neuro-psychiatric examination before the charges were referred for trial. Court-Martial Record, page 30.

Counsel for accused requested and was granted a ten day continuance to prepare for trial. Court-Martial Record, page 31.

[32] At the opening of the trial the following colloquy took place (Court-Martial Record, page 67):

"Law Member: Private Smith, you understand you are charged with a serious offense, involving a possible death penalty. Have you had ample time to confer with your Defense Counsel and with Lt. Liberman?

"Accused: Yes, sir.

"Law Member: You are satisfied to proceed with the trial at this time?

"Accused: Yes, sir.

"Law Member: You are satisfied you have had sufficient time to confer with your counsel to sufficiently try your case?

"Accused: Yes, sir."

[33] Petitioner's allegations were not substantiated by any facts, but were inferences which he sought to adduce. The line-up was conducted with his Commanding Officer present to protect his rights and with (among others) the Chaplain of the Field, the Executive Officer of the Field, and two British Police Officers as witnesses. (Court-Martial Record, page 39, and Transcript of Testimony, page 38.) The girls were kept in Lt. Todd's office in the Guard House, which opened onto the Parade Field, they were taken out one at a time, and the window of which petitioner complained had opaque panes (Transcript of Testimony, page 38). There was not a scintilla of evidence that either girl watched the other while outside. Petitioner's allegations might well be termed his unsupported imaginings.

[34] Petitioner referred to Article of War 24 (10 U. S. C. A. 1495) which is: "No witness before a military court, commission, court of inquiry, or board or before any officer conducting an investigation, or before any officer, military or civil, designated to take a deposition to be read in evidence before a military court, commission, court of inquiry, or board or before any officer conducting an investigation, shall be compelled to incriminate himself or to answer any question the answer to which may tend to incriminate him, or to answer any question not material to the issue when such answer might tend to degrade him."

ed as an involuntary confession, it did not prevent such identification at the trial.[35] Nor is the question of the admission thereof at the trial a proper subject of habeas corpus.[36] Moreover, fundamentally, such identification or physical examination is not within the doctrine of self crimination or involuntary confesion.[37] Physical inspection "does not call upon the accused as a witness, i. e., upon his testimonial responsibility."[38]

Petitioner further objects to the fact that a "Mrs. Kerry" was not called as a witness, evidently under the theory of denial of compulsory process. The prosecution "is not under a duty to place upon the witness stand every person who may have some knowledge of the crime which is the subject of the trial."[39] Nor is it bound to call any specific persons as witnesses,[40] and, where application is to the Courts for compulsory process for wit-
313 nesses to be produced at government expense, exercise of discretion by the trial court[41] is involved[42] which ordinarily would not be disturbed in a habeas corpus proceeding,[43] it must also appear that the witness if called would have been favorable to the accused.[44] This is true even where the question is raised on appeal as distinguished from a collateral proceeding.[45] The mere fact that a witness was not present or was not called is not in itself sufficient to constitute a denial of Compulsory Process.[46]

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[35] U. S. v. Bayer, U. S. Supreme Court, Slip opinion June 9, 1947, page 8.

[36] Miller v. Hiatt (CCA 3) 141 F. 2d 690; Eury v. Huff (U. S. App. D. C.) 146 F. 2d 17; Clarke v. Huff (U. S. C. A. D. C.) 119 F. 2d 204.

[37] Wigmore points out the distinction between these two commonly confused terms, Wigmore on Evidence, Vol. 8, paragraph 2266.

[38] Wigmore on Evidence, Vol. 8, paragraph 2265.

[39] Curtis v. Rives (U. S. C. A. D. C. 1941) 123 F. 2d 936, 940.

[40] Aycock v. U. S. (CCA 9) 62 F. 2d 612, cert. den. 53 S. Ct. 595, 289 U. S. 734, 77 L. Ed. 1482.

[41] In military procedure the decision is by the appointing authority before trial and the Court after trial commences. Manual for Courts-Martial, United States, Army, 1928, (corrected to April 20, 1943), paragraph 97, page 86.

[42] Casebeer v. Hudspeth (CCA 10) 121 Fed. 2d 914, para. 6-7, Cert. den. 314 U. S. 683, reh. den. 63 S. Ct. 23, 317 U. S. 704, 87 L. Ed. 562; Gates v. U. S. (CCA 10) 122 F. 2d 571, Cert. den. 62 S. Ct. 478, 314 U. S. 698, 86 L. Ed. 558; Nguield v. U. S. (C. A. D. C.) 118 F. 2d 375, Cert. den. Ruben v. U. S. 62 S. Ct. 580, 315 U. S. 798, 86 L. Ed. 1199.

[43] Fitzgerald v. Sanford (CCA 5) 142 F. 2d 445.

[44] Smith v. Squier (CCA 9) 1943) 136 F. 2d 536, Cert. den. 64 S. Ct. 85, 320 U. S. 774, 88 L. Ed. 464.

[45] Robinson v. U. S. (C. A. D. C. 1942) 128 F. 2d 322.

[46] Curtis v. Rives, *supra*.

Mrs. Kerry was with Miriam Cullum when Smith first accosted her. Petitioner contends she had made a statement in which she said "If I were in Court I would identify him" and that such statement was offered in evidence by the prosecution but ruled out and stricken from the record.[8] The Court-Martial Record does not show this
314 witness requested by Smith, and he admits that no request was made of the Trial Court.[9] Lt. Todd, confirming the Court-Martial Record, testified that he called every witness requested by Smith and he had a full opportunity to interrogate them.[10] As to Mrs. Kerry, Smith was fully aware that her name had appeared in the case, but he did not desire her as a witness.[11] Had he been so positive of his own innocence it would seem that he would have been eager to interview her. Not only, therefore, has he failed to present a question for consideration in habeas corpus but it is difficult to conceive how his rights as to witnesses could have been more carefully and fairly protected.

315 With reference to petitioner's contention that we must assume that the Court was influenced thereby, it is sufficient to say that even if such a statement of Mrs.

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[8] Transcript of Testimony, page 25.

We do not find this substantiated by the Court-Martial Record but in any event petitioner does not thereby show a favorable witness.

[9] Transcript of Testimony, page 33:

"Q. Did you request the Court itself to have Mrs. Kerry produced as a witness?

"A. No, sir."

[10] Transcript of Testimony, page 41:

"Q. Did you comply with his request and call the witnesses he requested you to call?

"A. I called every one of them.

"Q. Did you examine them?

"A. Yes, sir.

"Q. Did he examine them?

"A. Yes, sir.

"Q. Were their statements reduced to writing?

"A. They were."

[11] Lt. Todd testified (Transcript of Testimony, page 42):

"A. So far as from a prosecution standpoint it was not necessary. As far as from the Defense Standpoint, I asked Smith if he wanted her, and he said 'NO.'"

Smith himself said (Transcript of Testimony, page 17):

"* * * He asked me if I wanted to see her. I didn't know exactly whether I did or not. * * *"

Kerry was offered and refused, we do not understand it to be the law that we must presume that the Court did not perform its duty[3] in disregarding it, just as it would have instructed a jury to do.

The petition for the writ is accordingly denied and the rule to show cause dismissed.

FREDERICK V. FOLLMER,
United States District Judge.

August 7, 1947.

316 United States District Court
for the Middle District of Pennsylvania

(TITLE OMITTED)

Notice of Appeal—Filed Sept. 8, 1947

SIRS:

PLEASE TAKE NOTICE that the petitioner herein, BERNARD W. SMITH hereby appeals to the United States Circuit Court of Appeals for the Third Circuit from an order of Honorable Frederick V. Follmer, United States District Judge for the United States District Court for the Middle District of Pennsylvania, dated August 7, 1947, denying an application for a writ of habeas corpus and dismissing a rule to show cause in the above entitled action.

The petitioner hereby appeals from each and every part of said order and decision.

Judgment herein was entered with the Clerk of the United States District Court for the Middle District of Pennsylvania August 7, 1947.

Dated: September 2, 1947.

BERNARD W. SMITH,
Petitioner.

DANIEL F. MATHEWS,
913-919 University Bldg.,
Syracuse, New York.
FRANK J. McDONNELL,
403-405 Lincoln Trust Bldg.,
Scranton 3, Pennsylvania,
Attorneys for Petitioner.

TO:

CLERK OF DISTRICT COURT OF THE U. S. MIDDLE DISTRICT OF PENNSYLVANIA.

[3] Neufield v. U. S. *Supra*

ARTHUR A. MAGUIRE, ESQ.,
Asst. U. S. Attorney.

MAJOR THAYER CHAPMAN, JAG,
Washington, D. C.

318 In The District Court of the United States
For the Middle Distfict of Pennsylvania

(Title Omitted)

Order of Court As to Record—Filed Dec. 10, 1947

Now to wit, December 10, 1947, it appearing that it would be expedient to have copies of the record prepared in connection with the pending appeal, and that the entire original record should in any event be available for inspection by the Circuit Court of Appeals in said appeal; the Clerk of this court is therefore, in accordance with Rule 5(1) App. of the Rules of the United States Circuit Court of Appeals for the Third Circuit, directed to transmit the original Clerk's office files including the exhibits to the Clerk of the Circuit Court of Appeals in lieu of copies thereof.

FREDERICK V. FOELLMER,
U. S. District Judge.

No. 9509.

319 United States Circuit Court of Appeals for the
Third Circuit

In the Matter of the Application
of
BERNARD W. SMITH
for a Writ of Habeas Corpus

Order Granting Leave to Proceed in Forma Pauperis—Oct. 24, 1947.

PRESENT: BIGGS AND GOODRICH, *Circuit Judges.*

Upon consideration of the petition and affidavit of Bernard W. Smith,

It is hereby ORDERED that petitioner's appeal be docketed in this court without prepayment of costs, and that said petitioner be permitted to proceed in this court in *forma pauperis*.

By the Court,
BIGGS,
Circuit Judge.

October 24, 1947.

330 United States Court of Appeals
For the Third Circuit.

No. 9509. October Term, 1947.

BERNARD W. SMITH,
Petitioner-Appellant,

v.

WILLIAM H. HIATT, WARDEN, UNITED STATES PENITENTIARY, LEWISBURG, PENNSYLVANIA,
Respondent-Appellee.

Appeal From the District Court of the United States For the Middle District of Pennsylvania.

Argued April 8, 1948.

Before GOODRICH, McLAUGHLIN AND O'CONNELL,
Circuit Judges.

Opinion of the Court—Filed September 14, 1948.

By McLAUGHLIN, *Circuit Judge.*

In 1944, while based in England, appellant, then a private in our Air Corps, was convicted of rape and attempted rape by a general court-martial. His sentence of life imprisonment was later reduced to sixteen years. He appeals from the dismissal of his petition for habeas corpus by the District Court.

Both offenses were alleged to have been committed between 10:30 and 11:45 on the night of July 11, 1944, in the same area, which was about five miles distant from his particular base. Appellant claimed that on that evening he had bicycled by himself to public houses in nearby towns, had drunk some beer, and was back in camp
331 well before midnight. Miriam Cullum, the attempted rape complaining witness, testified that she was returning to her home that night about half past ten, walking along with a Mrs. Kerry and wheeling her bicycle beside her. An American soldier passing by asked to accompany them home. Mrs. Kerry said "No." Miss Cullum said nothing. The soldier went with them. Mrs. Kerry left them at her house. Miss Cullum went off on her bicycle. The soldier went with her or followed her. She says he then forced her off her wheel and attempted to rape her. Some people came along and the soldier rode away on his bicycle. Miss Cullum says she told her parents what had happened.

The second girl, Miss Dale, stated that she was on her way home about 11:45. She, too, was on a bicycle. She said an American soldier rode up to her on a bicycle and forced her off it. As some other soldiers passed she remounted and rode towards her home with the soldier riding beside her. A little later he pushed her from her wheel and after a struggle had intercourse with her. Miss Dale wore glasses. These were not dislodged in the melee. She, too, told her family of the occurrence. Neither the girls nor their families notified the police. It was Miss Dale's going to a doctor in fear of pregnancy, with the doctor advising the authorities, that brought on an official investigation.[1] Since the girls said an American soldier was involved in each instance, our army, through enlisted men of its Criminal Investigation Division, investigated them in conjunction with the local police. Meanwhile, the Provost Marshal, Lieutenant Todd, was interviewing suspects, among whom was appellant. The latter was questioned for two hours by Todd and held for an identification line-up which was consented to by him and his unit commander.

At the line-up the girls identified Smith. He contends that the line-up was unfair; that indications were given by the military police of his identity. We cannot, of course, here weigh the evidence as to that, but it is to be noted that the officer in charge was Lieutenant Todd. Todd returned Smith to his cell after the line-up and then would seem to have interviewed the girls that same evening. Exhibit B for the defense referred to at the trial as "Statement of Sheila Dale to Lieutenant Todd" appears to be the record of such an interview. Todd signed these as true copies. Illustrating Todd's connections with the interviews, on page 4 of Exhibit B at the end of Miss Dale's statement and just under her typed signature, appears the following:

"Original statements in the pocket book of P. C. 305 Felton, Pages Nos. 142-149, and 141, taken at 10:30 A. M. 12.7.44. at Dr. Beckett's Surgery, Main-

[1] The doctor examined Miss Dale about ten o'clock the morning following the occurrence. She had some bruises on the right thigh, left arm, left knee and a graze on the left knee. She was not *virgo intacta*. There was no evidence of injury in the vagina at all. A local witness testified that Miss Dale had a bad reputation for chastity. Admittedly she had been out with another soldier that evening. That soldier was not present or accounted for at the trial.

ningtree, and at 7:45 P. M. 18.7.44. at Raydon Aerodrome, respectively.

Certified True Copy
E. W. Shepherd.
Detective Sergeant.

A True Copy
Alan B. Todd
Alan B. Todd,
1st Lt. Inf."

A similar note follows the copy of Miss Cullum's statement. These point to close cooperation between Todd, chief of the Military Police, and the civilian constables. The government's brief emphasizes the later promotion of Lieutenant Todd to captain, which would merely confirm the impression that he was a zealous policeman. Exhibit B is not explained by the government. Its repetition of Todd's bald denial of seeing any witnesses until after his appointment as investigating officer hardly overcomes the implications in the photostat record.

333 As a result of the C. I. D. investigation and the interview and line-up conducted by Todd, charges were filed against Smith with a recommendation for general court-martial. Todd was appointed to conduct the thorough and impartial investigation called for by Article of War 70, 10 U. S. C. Section 1542, which reads in part:

"No charge will be referred to a general court martial for trial until after a thorough and impartial investigation thereof shall have been made. This investigation will include inquiries as to the truth of the matter set forth in said charges, form of charges, and what disposition of the case should be made in the interest of justice and discipline. At such investigation full opportunity shall be given to the accused to cross-examine witnesses against him if they are available and to present anything he may desire in his own behalf either in defense or mitigation, and the investigating officer shall examine available witnesses requested by the accused. If the charges are forwarded after such investigation, they shall be accompanied by a statement of the substance of the testimony taken on both sides."

Section 35a of Manual for Courts-Martial, U. S. Army, 1928 (corrected to April 20, 1943), repeats the statutory provisions and the requirements of impartiality. Cf. War De-

partment Technical Manual 27-255, "Military Justice Procedure" (1945), p. 37; Report of Secretary of War's Advisory Committee on Military Justice (1946), Section III E.

Todd's formal report reiterated what he had previously known plus some new matter from Miss Dale's sister and an American soldier who saw Miss Dale shortly after the offense. It also included statements by soldiers who said they saw Smith at the base five miles away from the crime scene within the critical time. Todd recommended a general court-martial.

334. The government asserts that, as he testified at the habeas corpus hearing, Todd had a completely open mind and was seeking only the facts. Unfortunately, as his testimony clearly shows, he considered the full facts unnecessary. He was asked why he had not examined Mrs. Kerry, the one person actually named in the investigation outside of the complaining witnesses who had seen the offending soldier closely. He answered, "So far as from a prosecution standpoint it was not necessary. As far as from a defense standpoint I asked Smith if he wanted her and he said, 'No'."[2] Such reply cannot be said to account satisfactorily for the elimination, without at least reasonable inquiry, of this vital witness. Todd's attitude, as he himself explains it, is interesting. Under AW 70 and in common fairness to Smith, the investigation had to be thorough and impartial. Its purpose was not only to present the prosecution with a case that would support conviction, but to put before the court-martial authority at least a substantial picture of what had happened, based on all essential evidence. This was not done.

After Lieutenant Todd's investigation was reviewed by the Staff Judge Advocate, a general court-martial was designated. Appellant asserts he was denied counsel. He was represented by an Air Corps officer who was not a lawyer. Two officers who were lawyers were also part of his representation, but he says they did not actively participate in his defense. We find no merit in this point raised. Johnson v. Zerbst, 304 U. S. 458, is cited but has no application. Articles 11 and 17 of the Articles of War control. Under them the general court-martial had the power to ap-

[2] According to Miss Culligan, while she and Mrs. Kerry were walking and the soldier in question was cycling beside them, two special constables then passed going up the hill and the soldier said "good night" to them. Those constables, apparently readily available, were never examined or called as

point, as it did, defense counsel subject to the right of the accused to select his own as provided. There is no requirement that either defense counsel or trial judge advocate be lawyers. Romero v. Squier, 133 F. 2d 528; Altmayer v. Sanford, 148 F. 2d 161. And a study of the record reveals no abuse of discretion by the court-martial authority in the defense counsel appointments made.

335

But Lieutenant Todd's participation in the court-martial as assistant trial judge advocate is a matter of further serious concern. Todd as provost marshal had been in active charge of the investigation which resulted in Smith's being held. Todd then took over as the impartial investigator. There was nothing of any consequence added to the case against Smith during this period. Because of Todd's report and recommendation as investigator a general court-martial was convened, Smith tried before it for most serious offenses, and Todd, a lawyer, was one of the two members of the prosecution staff in court. The transcript does not reveal him as actually examining, but with the case prepared by him from the beginning it is reasonable to assume that he was of considerable pre-trial and trial assistance to the trial judge advocate.

The review of the trial record by the staff judge advocate fails to comment on the failure to interrogate Mrs. Kerry or the special constables. It makes no mention that Provost Marshal Todd, responsible for Smith's arrest, was the impartial investigator whose report and recommendation resulted in the general court-martial in which he also took part as one of the two trial judge advocates.

On this habeas corpus appeal we cannot deal with alleged trial errors nor can we weigh the evidence. The only issue is the legality of the commitment of the appellant and the particular question before us is whether the court-martial had jurisdiction in view of the pre-trial investigation which was conducted. The government asserts that compliance with AW 70 is not a pre-requisite to the acquisition of jurisdiction by a general court-martial. In support of this it cites two cases where officers were tried by general courts. The courts included officers junior in rank to the accused, contrary to the Articles of War.

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This was held not to be a jurisdictional defect. The third reference is to a court having fewer than the maximum number of officers but more than the minimum

[1] Ex parte Quirin, 317 U. S. 1. In re Yamashita, 327 U. S. 1.

required.' The relevance of these decisions is not perceived.

It is then urged that the viewpoint of the 79th Congress as expressed in House Report No. 2722, on Resolution 291, was that the requirements of Article 70 enacted in 1920 were not mandatory. It is said that the report of the 80th Congress, House Report 1034, with respect to the bill amending the Articles of War which recently became law, is in accord with this. That report states that an investigation should precede every general court-martial trial, "but * * *" should be considered sufficient if it has substantially protected the rights of the accused." It should not, the report continues, be such as to "subject *every* * * * case to reversal for jurisdictional error on purely technical grounds." (Emphasis added.) While the thought of the current Congress as to 1920 legislation is not a judicial precedent, that thought tends to corroborate the jurisdictional nature of the error of which complaint is made.

Waite v. Overlade, 7 Cir., 164 F. 2d 722, is cited by the government for the proposition that the mandate of AW 70 is merely directory. In that case there is no indication wherein the pre-trial investigation was defective—the court simply states that it was alleged that "*proper* procedures had not been followed with respect to pre-trial investigation." And the opinion goes on to say at page 724: "If there was any relaxation of pre-trial investigation requirements not waived by appellant (and we are not convinced that there was), *it certainly was not of a nature seriously to impair any of his fundamental constitutional rights.*" (Emphasis added). In the present matter we are not faced by some necessary informality of investi-
337 gation but by the lack of its two essentials, thoroughness and impartiality. We said in United States v. Hiatt, 3 Cir., 141 F. 2d 664, 666, that "due process as applied to members of the military forces means "the application of the procedure of the military law. * * * But the due process clause guarantees to them that this military procedure will be applied to them in a fundamentally fair way." Judge Biggs sitting in the district court in Hicks v. Hiatt, D. C. M. D. Pa., 64 F. Supp. 238, 249, with particular reference to the accused soldier preparing his defense, said, "The petitioner was not given the benefit

'Swain v. United States, 165 U. S. 553; Mullan v. United States, 140 U. S. 240; Martin v. Mott, 25 U. S. 19.

of the procedure of the military law in this regard. This was a denial of due process of law to him." In a quite similar situation to the instant one where Todd is the real accuser, later impartial investigator, and finally assistant trial judge advocate, Judge Ryan in an exhaustive, well considered opinion on the subject holds: "It cannot be fairly said that an accused has suffered no injury or harm and that a purely technical wrong has been committed, which does no harm, when the one who in fact the accuser is appointed to conduct a thorough and impartial investigation. Especially is this not so, when the accuser functions, not only as the investigator, but later appears in the trial as a witness for the prosecution and gives material, vital and damaging testimony concerning the accused and evidence of an admission allegedly made by the accused to him." Henry v. Hodges, D. C. S. D. N. Y., 76 F. Supp. 968, 973.

The government stresses the recent decisions of the Judge Advocate General which maintain that the pertinent provisions of Article 70 are directory in effect.* However, in the Digest of Opinions of the Judge Advocate General of the Army (1912-1940), at page 292 appears the following:

> "A record of trial showed affirmatively that no investigation of the charges had been made prior to
> 338 the trial. Held that the provisions of Article of War 70, 41 Stat. 739 [10 U. S. C. A. Section 1542], with reference to investigating charges are mandatory and there must be a substantial compliance therewith before charges can legally be referred to trial. A court martial is without jurisdiction to try an accused upon charges referred to it for trial without having been first investigated in substantial compliance with the provisions of Articles of War 70, and in such a case the court martial proceedings are void ab initio."

Largely relying on the above, in Reilly v. Pescor, 8 Cir., 156 F. 2d 632, 635, the court said regarding a charge which had not been investigated in accordance with Article 70, "We therefore may concede without deciding that the Court-Martial was without jurisdiction to try the added charge of uttering a forged document."

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*CM 209477 Flood, 17 BR 149, 153; CM ETO 6694 Yarneck, 17 BR (ETO) 163, 179; CM (ETO) 4570 Haskins, 13 BR (ETO) 57, 71-75; GM 32348 Ruckman

In Anthony v. Hunter, D. C. Kansas, 71 F. Supp. 822, a major reason for sustaining the application for habeas corpus was that witnesses in behalf of the accused soldier, though available and named with a request that they be produced "were not produced at the Pre-trial Investigation or at the trial before the General Court Martial." And in the circumstances the court held that "Relief should be granted by a court of general jurisdiction, charged with the responsibility of inquiring into the legality of the detention of the accused."

As Judge Biggs said in Hicks v. Hiatt (supra), "The petitioner's conduct may well have been such as to bring disgrace upon the armed services." But "This fact may not be taken into consideration since the judgment of this court must be in accordance with law." The conversion of the provost marshal, who was the real accuser and arresting officer, into the investigator under Article 70 and then, following his recommendation for a general court-martial, his functioning as assistant trial judge advocate, was unjust to the accused. It did not substantially comply with AW 70. It did not give Smith the statutory protection guaranteed him as a soldier. The ignoring of Mrs. Kerry and the special constables though available and essential cannot be accepted as fulfilling the specific requirements for the investigation. We recognize the enormous exigencies of the then general conditions, but we cannot permit them to serve as an excuse for the failure to give the soldier involved the express safeguards with which Congress provided him.

The judgment of the District Court will be reversed and the cause remanded with directions that the appellant be discharged from custody.

GOODRICH, *Circuit Judge*, dissenting.

For the purpose of this dissent it will be assumed that compliance with Article of War 70 conditions the jurisdiction of a general court-martial, though the proposition is

[1] It will be remembered that there is no claim that defense counsel were ever asked whether they wished Mrs. Kerry produced as a witness. Paragraph 70d, as previously mentioned, did not require habeas corpus hearing that he asked Smith if he wished to have her as a witness. Smith at the same hearing testified that he asked his defense counsel for her presence as a defense witness during the course of the trial.

open to grave doubt.[1] But with this assumption there seems no adequate basis for rejecting the Trial Court's conclusion that the requirements of that Article were complied with and that a thorough and impartial investigation was made prior to the appellant's trial. Such a conclusion is one of fact not law and when made by a District Judge should be allowed to stand unless we think it clearly wrong, and, of course, this is especially true where he, and not we, have had the benefit of the presence of witnesses giving oral testimony. Elaboration of the wording and effect of Rule 32 is unnecessary.

The bases for rejecting the Trial Judge's conclusion here seem inadequate. Quite obviously Lieutenant Todd was not the party offended and had no individual concern in this soldier's prosecution. The record alternatively shows that he busied himself in securing witnesses requested by the petitioner. It seems to me clear that the sum total of his activities at the investigation stage of the case were only matters called for in the performance of his duties as Provost Marshal at this particular air base. For

[1] At least since 1943 the administrative interpretations of such section have been uniformly of the view that it was not jurisdictional. Holding of Board of Review in C. M. 229477, 1 Dig. 17 B. R. 145, 153.6 (decided February 2 1943); Holding of Board of Review in C. M. 323486, Ruckman (1947). The contents of the legislative history cited in the majority's opinion compels the view that Congress apparently agrees with such interpretation and did not at that time desire to change it. Furthermore the opinion of the Judge Advocate General cited in the majority's opinion to the effect that the Article is jurisdictional was superseded by his opinion in the Floyd case. See 57 Yale L. J. 483, 485 (1948). That earlier opinion, moreover, was in a case where the Judge Advocate General had found no pretrial investigation whatsoever. See 57 Yale L. J. supra, 484 f. n. 15.

The authorities relied upon do not persuade such a conclusion. They all rely upon the superseded Judge Advocate General's opinion and are cases in which the irregularities in the pretrial investigations prejudiced the trial itself. Thus in Hicks v. Hiatt, 64 F. Supp. 238 (M. D. Pa. 1946) the refusal of the accused that his pretrial statements would be used against him at the trial, induced statements which were used against him at the trial. Moreover, the matters vital to the accused's defense were not investigated on the mistaken notion that they were incompetent in the consideration of the offense. Anthony v. Hunter, 71 F. Supp. 823 (D. C. Kansas 1947), also relied upon the superseded opinion and the witnesses requested by the accused were not produced at the pretrial investigation of the trial. The only two Circuit Court of Appeals cases which deal at all with the point are as much in favor of the Government as the Petitioner. Wade v. Overlade, 164 F. 2d 732 (C. C. A.

instance, it is said that he took statements from complaining witnesses. If he did, it would seem to me to have no significance in making a conclusion concerning the fairness of his investigation. But his signature on the photostat of those statements is only as an authenticating officer; in other words, he simply certifies certain writing as a true copy of another writing. The statements in fact were taken by a man named Felton, a British police constable. It is true that Lieutenant Todd in cooperation with the British police conducted the line-up in which the girls who claimed to have been attacked identified Smith. The Lieutenant did that because it was part of his official duties. It does not, it is submitted, in the least show any bias against this prisoner. The girls made the identification, not Todd.

341 I cannot follow the reasoning by which it is thought that Lieutenant Todd's participation as an Assistant Trial Judge Advocate at the court-martial showed a lack of fair or thorough investigation. Possibly such previous work as investigator would make it inappropriate for him to sit as a member of a judicial tribunal.[2] But he only acted as counsel and assistant counsel at that. The use of information gained in the investigation, assuming it was made, does not show the investigation was not impartial and objective.

The last point relied on to prove lack of thoroughness in the investigation was the failure to call Mrs. Kerry. There are three answers to this: One is that Smith, himself, did not want her called. The second is that at most she was present only at the first meeting between Smith and the complaining witness in the attempt case. And, third, I submit there is no basis for requiring that an investigation, in order to be thorough and impartial, seek out every person mentioned in connection with the affair under scrutiny, especially after a preliminary statement has been taken indicating the probable content of what such person would have to say.

This is a case where, in my opinion, the conclusion reached by the Trial Judge should stand and it seems to me

[2] But cf. Keyes v. United States, 109 U. S. 336 (1883), in which the validity of a court-martial sentence was upheld by the Supreme Court where the same officer was a complaining witness, a witness, and sat and passed

that we are going beyond our proper function in upsetting it.

A True Copy

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

342 In the United States Circuit Court of Appeals
For the Third Circuit

No. 9509 October Term, 1947

Bernard W. Smith, petitioner-appellant,

v.

William H. Hiatt, Warden United States Penitentiary, Lewisburg, Pennsylvania, respondent-appellee.

Argued April 8, 1948

Before Goodrich, McLaughlin and O'Connell, Circuit Judges.

Judgment—Sept. 14, 1948.

On appeal from the District Court of the United States for the Middle District of Pennsylvania.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Middle District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby reversed and the cause remanded with directions that the appellant be discharged from custody.

Dated September 14, 1948

McLaughlin,
Circuit Judge.

Endorsements:

Judgment Reversing Judgment of District Court etc.
Received and Filed Sept. 14, 1948.
Ida O. Creskoff, Clerk

343 United States Circuit Court of Appeals
For the Third Circuit

(TITLE OMITTED)

Notice of Motion for Release

Comes now the petitioner-appellant above named, who respectfully moves this Court at a term thereof to be held October 4, 1948 at the United States Court House in the City of Philadelphia, Pa. at the opening of Court on that day or as soon thereafter as counsel may be heard, for an order directing the Warden of the United States Penitentiary at Lewisburg, Pennsylvania, to forthwith release or enlarge from custody the petitioner-appellant, Bernard W. Smith, No. 14290, on his own recognizance pending the application of the appeal to the United States Supreme Court, and further pending the possible review of such proceeding by the United States Supreme Court.

DANIEL F. MATHEWS,
Attorney for Petitioner-Appellant.
Office & P. O. Address.
913-919 University Bldg.,
Syracuse, New York.

To:
Clerk of the U. S. Court of Appeals
for the Third Circuit.
2046 U. S. Court House.
Philadelphia, Pa.

To:
Arthur A. Maguire.
U. S. Attorney.
Scranton, Pa.

To:
Major Thayer Chapman.
United States Army.
Judge Advocate General's Office.
Washington, D. C.

344 In the United States Circuit Court of Appeals
For the Third Circuit.

Petition for Release—Filed Sept. 27, 1948

To the United States Circuit Court of Appeals for the Third Circuit:

The petition of DANIEL F. MATHEWS respectfully shows the Court:

1. That he is an attorney and counselor at law licensed to practice his profession in the State of New York and the United States Court of Appeals for the Third Circuit, with an office for the practice of his profession at 919 University Bldg., Syracuse, New York.

2. That the petitioner has represented the above named defendant Smith, for upwards of two years.

3. That in the proceedings in this Court Smith has been declared a pauper and is prosecuting this action at the present time as a pauper.

4. That pursuant to a decision of this Court under date of September 14, 1948, the defendant, Smith, was ordered released from custody in the United States Penitentiary at Lewisburg, on the ground that the court martial which convicted and sentenced him lost its jurisdiction by failure to respect the rights of the defendant herein.

5. That the defendant Smith has been in the army since 1942 and been in prison since July, 1944.

6. That he has no funds.

7. That the petitioner was employed by Smith's mother after she had consulted a number of other lawyers to take such steps as might be necessary to effect his release.

8. That the petitioner has heretofore traveled to Washington on four occasions and interviewed Congressman and Government and Army officials in connection with the release of the defendant; that the petitioner visited the defendant in prison on two or three occasions and went to Lewisburg on two or three other occasions in connection with this case.

345 9. That a writ of habeas corpus was issued in this case, an elaborate and comprehensive brief prepared and submitted, and the writ was denied by Mr. Justice Follmer, United States District Judge, in August, 1947.

10. That the petitioner thereafter went to Philadelphia on three occasions, checking law and ascertaining information concerning the ways and means and rules of appealing this case.

11. That the petitioner has expended large sums of money in telephone calls and travel expense over a period of two years, and extra clerk hire and stenographic work; that the petitioner has received approximately $600.00 to date in this case and has expended nearly twice as much in expenses.

12. That the mother of the defendant herein is unable to post bail and that there is no person willing to post bail in this case.

13. That the Court has determined that the defendant's cause is meritorious. The Court has found that the conviction is illegal and hence the sentence of imprisonment is illegal. The petitioner contends that the dishonorable discharge is also illegal in view of the determination of the Court as set forth in its opinion.

14. The petitioner has been advised by the United States Attorney in writing that an application for a certiorari to the United States Supreme Court would be requested and that pursuant thereto the defendant would be confined in jail for thirty days under an automatic stay of mandate.

15. Considering the facts in the case herein together with the determination of law as found by this Court, it is urged that the defendant should now be released on his own recognizance.

16. The defendant has been determined to be not guilty and in effect acquitted of the charges as of the present time. Pending the application for a certiorari or the determination of the United States Supreme Court in the event certiorari should be granted, the defendant should be at liberty.

WHEREFORE, the petitioner respectfully prays that this Court direct the release of the defendant, Bernard
346 Smith, from the United States Penitentiary at Lewisburg, Pennsylvania, forthwith on his own recognizance, pursuant to the rules of the United States Court of Appeals for the Third Circuit.

DANIEL F. MATHEWS.

Duly sworn to by Daniel F. Mathews jurat omitted in printing. (All in italics)

347 In the United States Circuit Court of Appeals
For the Third Circuit

BERNARD W. SMITH, PETITIONER-APPELLANT,

vs.

WILLIAM H. HARE, WARDEN, UNITED STATES PENITENTIARY, LEWISBURG, PENNSYLVANIA, RESPONDENT-APPELLEE

State of New York,
County of Onondaga, } ss.:

ANNE MILLER, being duly sworn, deposes and says:

That she resides at 2513 Grant Boulevard, Syracuse, New York; that she is the mother of Bernard W. Smith, the above named petitioner-appellant; that said Bernard W. Smith is the only child of the deponent herein; that the father of the child John Smith, died a resident of the City of Syracuse in 1921; that the deponent thereafter married George Miller in the year 1929.

That Bernard W. Smith was born April 21, 1911; that at the time of John Smith's death the respondent-appellant, Bernard W. Smith, was 10 years old; that the deponent remained unmarried and brought up Bernard Smith.

That on May 11, 1928 Bernard Smith joined the United States Navy; that after Bernard left for the navy the deponent married her present husband, George Miller, and they have lived together continuously since the day of said marriage and still reside together at the address afore-said.

That during the period of time from Mr. Smith's death in 1921 to the time Bernard joined the navy in 1928 the deponent worked at the L. C. Smith Typewriter Plant in Syracuse, New York, and supported and maintained and brought up the petitioner-appellant, Bernard Smith; that at the time Bernard joined the navy he was 17 years old and he studied while in the navy and obtained sufficient credits to have the equivalent of a high school diploma.

That in the Spring of 1942 the petitioner-appellant, Smith, entered the service and went overseas shortly there-after.

348 That he was convicted of the present crime in England in the Summer of 1944 and has been in confinement continuously since.

That the deponent consulted with Irving Higbee, the present U. S. District Attorney who was also President of the Onondaga County Bar Association, and Mr. Higbee recommended several lawyers, and finally the deponent

consulted Daniel E. Mathews of the firm of Driscoll, Mathews & Gingold in about May, 1942 and that firm has handled the case continuously to date.

That the deponent and her husband do not own their own home; that her husband and the stepfather of the petitioner-appellant is employed as a packer at Barbans & Black Warehouse (wholesale hardware dealer) and that the deponent is presently employed at the Prosperity Company, manufacturers of garment presses, and has been so employed since about November, 1942.

That the deponent works 40 hours a week at the Prosperity Company and earns on an average of $41.00 a week gross, and after various deductions for taxes, etc., receives approximately $36 per net of take home pay; that the only funds owned by the deponent is a bank account in the First Trust & Deposit Company in which there is a balance of approximately $1000. Deponent has approximately $187.00 in war bonds, current value.

That the deponent is unable to provide bail for her son, Bernard Smith, owning no property and having no means save her salary; that she is unable to deposit any sum with any bonding company for the purpose of obtaining a bail bond from any surety company; that she has paid her attorney approximately $500 and that he has traveled to Washington on four occasions, to Lewisburg, Pa. on five occasions, to Philadelphia, Pa. on two occasions, and has advanced such monies as were necessary to care for the fees and disbursements up to the present time.

After the appeal was filed in this court an order was obtained declaring the defendant a pauper; that the deponent knows of her own knowledge that the amount expended by her to her attorney have not been adequate to care for the actual disbursements made in this matter and that nothing has been paid for services.

That as of this date, Bernard W. Smith, the only son of this deponent herein, has spent four years and three months in jail on a conviction which has been adjudged by this court to be invalid.

Deponent prays that this court make an order pursuant to the rules in this court releasing the defendant on his own recognizance pending the determination of the Government's appeal. In the event the Government should ultimately be successful nothing would be lost. In the event the Government should either be denied a certiorari to the United States Supreme Court or in the event that the certiorari is granted and the Government should be un-

successful in the appeal, nothing can return to the defendant the four years of confinement already served.

Wherefore, the deponent prays that this court direct that the defendant be released forthwith on his own recognizance pending the determination of the application for certiorari, and, if the application be granted, pending the final determination and judgment of the United States Supreme Court.

Adolf Mueller

Duly sworn to by Adolf Mueller [illegible] omitted in printing.

(All in italics)

354 United States Court of Appeals for the Third Circuit

(Title omitted)

Order of Release—Oct. 8, 1948

Present: Goodrich, McLaughlin and O'Connell,
Circuit Judges.

Upon consideration of the Petition, by Appellant for release from custody, and the Affidavit of counsel for appellee in opposition thereto, and after full hearing,

It is Ordered that the appellant, Bernard W. Smith, be released from custody upon posting bail in the sum of five thousand dollars ($5,000.00).

By the Court,
Herbert F. Goodrich,
Circuit Judge.

October 8, 1948.

355 I, Ida O. Cresskoff, Clerk of the United States Courts of Appeals for the Third Circuit, Do Hereby Certify the foregoing to be a true and faithful copy of the original proceedings in this Court in the case of Bernard W. Smith, Appellant, vs. William H. Hiatt, Warden, United States Penitentiary, Lewisburg, Pa., No. 9769, on file and now remaining among the records of the said Court, in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 12th day of October in the year of our Lord one thousand nine hundred and forty-eight, and of the Independence of the United States the one hundred and seventy-third.

Ida O. Cresskoff,
Clerk of the U. S. Court of Appeals,
Third Circuit.

(SEAL)

In the Supreme Court of the United States

October Term, 1948

No.

WILLIAM H. HAYES, Warden, [illegible] Penitentiary, Lewisburg, Pennsylvania, Petitioner,

v.

BENJAMIN W. SMITH

Stipulation as to Contents of Printed Record On Petition for Writ of Certiorari

Subject to the approval of this Court, it is hereby stipulated and agreed by and between the attorneys for the respective parties hereto that upon the hearing of the petition for a writ of certiorari the printed record shall consist of the following papers and documents, the originals or certified copies of which are now on file with the Clerk of this Court:

(1) Docket entries in habeas corpus proceeding.

(2) Petition for writ of habeas corpus filed January 2, 1947.

(3) Rule to show cause, filed January 27, 1947.

(4) Response to rule to show cause, filed January 28, 1947.

(5) Order of District Court to produce habeas corpus petitioner at hearing, filed February 4, 1947.

(6) Transcript of hearing on rule to show cause, held February 11, 1947.

(7) Government's Exhibit No. 1 at hearing, consisting of photostatic copy of the court-martial proceedings and allied documents.

(8) Government's Exhibit No. 2 at hearing consisting of photostatic copy of Application for Appointment of Harry Lieberman in Officers' Reserve Corps of Army.

357 (9) Opinion and Order of District Court denying petition for writ of habeas corpus and dismissing rule to show cause, filed August 7, 1947.

(10) Notice of appeal, filed September 5, 1947.

(11) District court's order of December 24, 1947, directing clerk to send original papers and exhibits to Court of Appeals in lieu of copies thereof.

(12) Order of Court of Appeals of October 24, 1947, permitting appellant to proceed on appeal *in forma pauperis*.

(13) Opinion of Court of Appeals, filed September 14, 1948.

(14) Judgment of Court of Appeals, filed September 14, 1948.

(15) Appellant's motion to be enlarged on his own recognizance, and affidavits of Daniel F. Mathews and Addie Miller in support thereof, filed September 22, 1948.

(16) Order of Court of Appeals of October 8, 1948, directing appellant's release from custody upon posting bail in the sum of $2,000.

(17) Certificate of clerk of Court of Appeals.

(18) This stipulation.

It is further stipulated and agreed that in the event the petition for a writ of certiorari is granted the printed record shall consist of the same printed record as that used in connection with the petition for the writ, plus the order granting certiorari.

PHILIP B. PERLMAN,
Solicitor General.

DANIEL F. MATHEWS,
Attorney for Respondent.

November 5, 1948.

In the Supreme Court of the United States

October Term, 1948

No. 457

WILLIAM H. HYATT, Warden of the State Penitentiary at Lewisburg, Pennsylvania, petitioner

v.

BENJAMIN W. SMITH

Stipulation correcting errors in the printed record

It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto that the printed record herein is in the two following particulars, and that it should be deemed to read in the corrected manner indicated:

1. On page 90, immediately following the heading "Exhibit 'B,'" and before the paragraph commencing "Original statements" there is a substantial omission. The omitted language appears, however, at a later point in the record, to wit, beginning with the words "Statement of Miriam Florence Cullum," at page 258, immediately following the heading "Defendant Exhibit B," and extending to (but excluding) the heading "Government's Exhibit No. 2," at page 260. Consequently, page 90 should be deemed to read as though this language were interlineated at the point indicated.

It should be pointed out, however, that the language next recited to at pages 258-260 also properly appears at that point in the record.

2. The first paragraph on page 90, beginning with the words "Original statements," is slightly garbled, owing to the fact that the perforations caused by the binding holding the original papers of the court martial record together caused the paragraph to be partially illegible to the printer. The paragraph should read as follows:

"Original statements on the pocket book of P. C. 306 Felton. Pages Nos. 131-137, and 142, taken at 7 P. M. 12-7-44 at No. 27, Colchester Rd. Lawford, and at 7.15 p. m. 12-8-44 at Lexton Aerodrome, respectively."

Philip B. Perlman,
PHILIP B. PERLMAN,
Solicitor General.

Daniel F. Mathews,
DANIEL F. MATHEWS,
Attorney for Respondent.

JANUARY 5, 1949.

821231 49

Supreme Court of the United States

Order allowing certiorari.

Filed February 7, 1949

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE: 1949

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In the Supreme Court of the United States

October Term, 1948

WILLIAM H. HATT, Warden, United States Penitentiary, Lewisburg, Pennsylvania, *Petitioner*,

vs.

HOWARD W. SMITH.

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In the Supreme Court of the United States

October Term, 1948

No. 457

WILLIAM H. HIATT, Warden, United States Penitentiary, Lewisburg, Pennsylvania, *Petitioner*,

v.

BERNARD W. SMITH

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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The Solicitor General, on behalf of petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit (R. 287) reversing the order of the District Court for the Middle District of Pennsylvania (R. 275) dismissing a rule to show cause why a petition for a writ of habeas corpus should not issue and denying the petition, and remanding the cause with directions to discharge the relator, respondent herein, from custody.

OPINIONS BELOW.

The majority and dissenting opinions in the Court of Appeals (R. 277-287) are reported at 170 F. 2d 61. The opinion of the District Court (R. 264-275) is reported at 72 F. Supp. 935.

JURISDICTION.

The judgment of the Court of Appeals was entered September 14, 1948 (R. 287). The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED.

1. Whether the 70th Article of War, directing a "thorough and impartial investigation" of charges before reference thereof to a general court-martial for trial, was substantially complied with in this case.

2. Whether, in any event, compliance with AW 70 is a jurisdictional prerequisite to a valid court-martial trial.

STATUTE INVOLVED.

The 70th Article of War (10 U. S. C. 1542) provides in pertinent part:

* * * * * * * *

> No charge will be referred to a general court-martial for trial until after a thorough and impartial investigation thereof shall have been made. This investigation will include inquiries as to the truth of the matter set forth in said charges, form of charges, and what disposition of the case should be made in the in-

terest of justice and discipline. At such investigation full opportunity shall be given to the accused to cross-examine witnesses against him if they are available and to present anything he may desire in his own behalf either in defense or mitigation, and the investigating officer shall examine available witnesses requested by the accused. If the charges are forwarded after such investigation, they shall be accompanied by a statement of the substance of the testimony taken on both sides.

* * * * * * *

STATEMENT.

On August 26, 1944, respondent Bernard W. Smith, a private in the United States Army, was convicted in England by an Army general court-martial of rape and assault with intent to commit rape, in violation of AW 92 and 93 (10 U. S. C. 1564, 1565), respectively, and was sentenced to life imprisonment, dishonorable discharge, and forfeiture of all pay due and to become due (R. 73-75, 251-252). The proceedings were thereafter reviewed by two separate Army reviewing authorities (R. 42-58, 59-73), and on March 26, 1946, by order of the Secretary of War, at the direction of the President, the imprisonment portion of the sentence was commuted to 16 years (R. 38-39).

The petition for a writ of habeas corpus (R. 2-5) which gave rise to the present proceeding was filed January 2, 1947, in the District Court for the Middle District of Pennsylvania. So far as is now pertinent, the petition challenged the jurisdic-

tion of the court-martial on the ground that AW 70, *supra*, pp. 2-3, providing that charges be given a "thorough and impartial investigation" before being referred to a general court-martial for trial, had not been complied with, in that, allegedly, Lieutenant Todd, the investigating officer, "being the originator of the charges and the accuser in fact, was ineligible to be the impartial investigator under the 70th Article of War" (R. 4).[1] A rule to show cause issued (R. 6) and a response to the petition and rule was filed (R. 6-8). Following a hearing (R. 9-37), at which respondent and Todd testified and the court-martial record was received in evidence, the District Court wrote an opinion (R. 264-275) finding that AW 70 had been complied with, dismissed the rule to show cause, and denied the petition for the writ (R. 275). On appeal, the Court of Appeals for the Third Circuit, one judge dissenting (R. 284-287), reversed the order of the District Court and remanded the cause with directions to discharge respondent from custody (R. 287) on the ground that AW 70 had not been substantially complied with because the pre-trial investigation had not been thorough and impartial (R. 277-281, 284). The majority also held—necessarily, in view of their decision declaring the court-martial sentence void—that com-

[1] This was the first occasion on which any such contention was made, no such attack on the jurisdiction of the court-martial having been made at any time during the court-martial proceedings.

pliance with AW 70 is a jurisdictional prerequisite to a valid trial by general court-martial (R. 281-284). The dissenting judge assumed, *arguendo*, that compliance with AW 70 is such a jurisdictional prerequisite (though expressing "grave doubt" concerning the proposition, R. 284-285), but expressed the conviction that the District Court was fully justified in finding that there had been substantial compliance in this case (R. 285-287).

The relevant facts may be summarized as follows:

Late in the evening of July 11, 1944, an American soldier assaulted and attempted to commit rape upon an English girl named Miriam Cullum on a lonely roadside in England, but abandoned the attempt and fled when two passers-by approached (R. 164-169). Less than an hour later, the same soldier succeeded in committing rape upon another English girl, Sheila Dale, at approximately the same location (R. 119-127).

The rape of the Dale girl was reported to the British civilian police on the following morning, July 12, and during the following week a British constable named Felton conducted an extensive investigation, which included, towards the end of the week, the attempted rape on the Cullum girl (R. 96-97, 191-193, 197-199). During this investigation, Felton took statements from both girls concerning the attacks (R. 91-93, 258-260, 90) and also the statements of a number of other English civilian witnesses (R. 90, 93-96).

On July 18, 1944, Felton and another British constable went to the office of Lieutenant Alair Todd, the Provost Marshal of a nearby United States Army Air Force base known as "Raydon Aerodrome," told Todd about the attacks, and furnished him with a description of the girls' assailant as supplied by the girls (R. 31, 97). As a result of the interview, several soldiers attached to the base, among whom was the respondent, were summoned to Todd's office for questioning by Todd and the constables (R. 31-32, 97, 199-200). That evening, July 18, Todd conducted a line-up, or identification parade, consisting of 15 soldiers, including respondent, and both girls, independently, identified respondent as their attacker (R. 32-33, 97, 194-196).[2]

Immediately following this identification, each of the girls gave Felton another statement, supplementing her original statement (*supra*, p. 5), attesting to the fact of her identification of respondent at the line-up (R. 93, 260, 90).

On the following day, July 19, 1944, respondent's commanding officer, Captain MacGregor, filed formal charges accusing respondent of the offenses (R. 73-75), and on the day after that, July 20, Lieutenant Todd was designated to investigate the charges in accordance with AW 70 (R. 99).

Lieutenant Todd conducted the AW 70 investigation on July 21, 22, and 23, 1944 (R. 85, 86, 88, 97), and on July 24, 1944 (R. 99), he submitted his

[2] Both girls also identified respondent as their assailant at the trial (R. 127, 168).

"Pretrial Investigating Officer's Report" (R. 82-100), in which he recommended trial by general court-martial. In this report, he stated that "At the outset of the investigations, I informed the accused of the nature of the charges * * *; of the names of the accuser and witnesses * * *; of the fact that the charges were about to be investigated; of his right to cross-examine all available witnesses against him and to present anything he may desire in his own behalf, either in defense or mitigation; of his right to have the investigating officer examine available witnesses requested by him; and that it was not necessary for him to make any statement * * *, but that if he did make one it might be used against him" (R. 83).

Todd attached to his report three exhibits, containing the substance of the statements given him by the witnesses he interrogated and also certain documentary evidence examined by him, consisting of statements of witnesses to Constable Felton in the course of the latter's preliminary investigation (R. 83-84).[3]

[3] Exhibit A (R. 85-89) consisted of summaries of the statements of 15 witnesses interrogated by Todd at respondent's request.

Exhibit B (R. 90-97, 258-260) included certified copies of Miss Cullum's and Miss Dale's original (*supra*, p. 5) and supplementary (*supra*, p. 6) statements to Constable Felton and also certified copies of the statements of the other English civilian witnesses to Felton (*supra*, p. 5).

Exhibit C (R. 97-99) consisted of summaries of statements given to Todd by Miss Cullum and Miss Dale, which further

The court-martial trial took place on August 25 and 26, 1944 (R. 104), and Lieutenant Todd was detailed at the trial as assistant trial judge advocate (R. 111).

At the habeas corpus hearing, Lieutenant (then Captain) Todd testified that around July 16 or 17, 1944,[1] two British constables came to his office and told him about the attacks on the two English girls.

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supplemented their earlier statements to Felton, contained in Exhibit B.

Todd stated in his report that Miss Cullum and Miss Dale had been examined by him in respondent's presence; that respondent had been permitted to cross-examine the two girls with Todd's assistance, and that "Their testimony substantiated their statements [to Felton] shown on Exhibit B, with additional matter as shown on Exhibit C" (R. 83-84). Todd further stated in his report that respondent had been apprised of the statements made to Felton by the other English witnesses, as contained in Exhibit B, but that they were not examined in respondent's presence because respondent stated that he did not desire to cross-examine them (R. 84).

Beneath Miss Dale's statements to Felton (original and supplementary), as they appeared in Exhibit B, was the legend (R. 93) which is reproduced in the majority opinion below (R. 278-279). This legend was to the effect that the "Original statements" of Miss Dale were contained in Felton's pocket book, that a "true copy" of the statements had been made by a Detective Sergeant Shepherd (apparently another British police officer), and that Todd had, in turn, certified the copy attached to his report as a "true copy" of Shepherd's certified copy. A similar legend appeared beneath Miss Cullum's statements (original and supplementary) to Felton (R. 258-260, 90), as well as beneath each of the statements of the other English witnesses to Felton (R. 90, 94, 95, 96).

[1] Actually, as we have seen, the date was July 18, 1944 (*supra*, pp. 5-6).

This was Todd's first knowledge of the matter. The constables explained to Todd that an investigation had been started by "the C. I. D. [Criminal Investigation Division, U. S. Army]," and that they had come to the base to help in the investigation. The constables furnished Todd with a description of the assailant as supplied by the girls, whereupon Todd summoned several soldiers, among whom was respondent, for questioning. Respondent was questioned both by Todd and the constables. Todd subsequently conducted a line-up of 15 men, including respondent. Respondent consented to appearing in the line-up and, to insure fairness, Todd had the field chaplain and the field executive officer as well as the respondent's commanding officer, Captain MacGregor, witness the line-up. (R. 31-32). The English girls then, independently of each other and without hesitation, identified respondent as their attacker. Respondent later told Todd that he thought the line-up had been conducted fairly, though he still denied his guilt. (R. 33).

Todd further testified that when he was appointed AW 70 investigating officer he "was of a

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According to Todd's testimony, he conducted this line-up in his capacity as AW 70 investigator, several days after the interrogation of respondent in Todd's office (R. 32, 35-36). It is clear from the court-martial record, however, that Todd was mistaken in this respect. The line-up was conducted on the evening of July 18, 1944, the same day that respondent was interviewed in Todd's office, and two days before Todd's appointment as AW 70 investigation officer (*supra*, p. 6).

perfectly fair mind" and only "wanted to get at the truth of the matter" (R. 33). At the start of the investigation, he testified, he advised respondent that he could make a statement or not, as he chose, and that he could be present at the interrogation of all witnesses and examine them himself. Respondent did in fact accompany Todd whenever the latter went to question witnesses, Todd stated, and was given full opportunity to, and did, cross-examine them. Todd further testified that respondent requested him to call certain witnesses in his own behalf to substantiate his defense of alibi. Todd did call and question such witnesses, he said, and permitted respondent to question them. (R. 34).

With regard to Mrs. Kerry, a woman who had been in the company of the Cullum girl when respondent first accosted the latter, shortly before his assault on her (R. 164-165), Todd testified that he did not interrogate her because (R. 35)

> So far as from a prosecution standpoint it was not necessary. As far as from the Defense standpoint, I asked Smith if he wanted her and he said "No."*

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*The reason why Todd was asked particularly about Mrs. Kerry was the fact that respondent had previously testified at the hearing that Todd had advised him during the AW 70 investigation not to request that this witness be called and interrogated (R. 20). Todd, however, denied having given any such advice (R. 35).

SPECIFICATION OF ERRORS TO BE URGED.

The Court of Appeals erred:

1. In holding that the requirements of AW 70 were not substantially complied with in this case.

2. In holding that non-compliance with AW 70 is a fatal jurisdictional bar to a valid court-martial trial.

3. In reversing the order of the District Court and ordering respondent's discharge from custody.

REASONS FOR GRANTING THE WRIT.

This is a case where a soldier concededly subject to military law has been convicted by a lawfully constituted general court-martial, after a fair trial, upon overwhelming evidence of guilt, of one of the most serious offenses known to the law; where the sentence has been approved and confirmed after the record of trial was painstakingly reviewed (see R. 42-58, 59-73) by the agencies provided by law for that purpose; but where the trial has been held vitiated and the convicted person ordered freed, beyond practical possibility of re-trial, because of alleged errors occurring in the hinterland of the proceedings, long prior to the actual commencement of the trial. We submit that, in the words of Judge Learned Hand in an analogous case (*United States ex rel. McCann v. Thompson*, 144 F. 2d 604, 608 (C. A. 2); certiorari denied, 323 U. S. 790), "Nothing could more effectively defeat the interests of justice."

The Court of Appeals held (1) that the pre-trial investigation of the charges in this case was not thorough and impartial, with the result that the requirements of AW 70, *supra*, pp. 2-3, were not substantially complied with, and (2) that, by reason of such non-compliance, the court-martial trial was a nullity for lack of jurisdiction. If the court was wrong in either respect, its decision is unsupportable. We submit that it was wrong in both respects. The decision below, moreover, is in square conflict with a Second Circuit decision in respect of the first holding (*infra*, pp. 16-18) and is probably in conflict with a Seventh Circuit decision in respect of the second holding (*infra*, pp. 23-24).

1. *There was substantial compliance with AW 70.*—It is undisputed that Lieutenant Todd, the AW 70 investigating officer, fully advised respondent as to all his rights—to cross-examine adverse witnesses, present witnesses of his own, make a statement, or not, as he chose, etc.—and that respondent in fact took full advantage of all such rights (*supra*, pp. 7, 9-10). Todd testified, moreover—and the District Court accepted his testimony as true (R. 271)—that he entered upon his duties as investigating officer with a "perfectly fair mind," desiring only "to get at the truth of the matter" (*supra*, p. 9). Despite all these facts, however, the majority below held that Todd's investigation was not "thorough and impartial," as

required by AW 70, for the following three reasons: (a) Todd failed, in his capacity as AW 70 investigator, to interrogate the witness Mrs. Kerry (R. 280); (b) Todd subsequently was named assistant trial judge advocate at the court-martial trial (R. 281); and (c) Todd took part in the preliminary investigation, i. e., the investigation which preceded the filing of the formal charges which he subsequently investigated pursuant to AW 70 (R. 278-280). None of these reasons, we submit, warrants the conclusion reached that Todd's AW 70 investigation was not thorough and impartial. We discuss them briefly, *seriatim*:

(a) The majority's criticism of Todd's failure to interrogate Mrs. Kerry is, we submit, hypercritical. The failure manifestly did not show lack of impartiality, since respondent, according to Todd's testimony at the habeas corpus hearing (*supra*, p. 10), affirmatively indicated to him that he did not desire this witness to be interrogated. And Todd's belief that "from a prosecution standpoint it was not necessary" to interrogate her certainly had justification in view of the positiveness of both victims' identification of respondent as their assailant. Todd was conducting a *pre-trial* investigation of charges. He was not finally determining respondent's guilt or innocence. A pre-trial investigator obviously must exercise some discretion in determining the limits of his investigation. The majority below have, in effect, substituted their discretion for that of Todd.

(b) When Todd was appointed assistant trial judge advocate at the trial, his work as pre-trial investigating officer had been completed and his report filed. With the dissenting judge (R. 286), therefore, we cannot understand how Todd's subsequent appointment as assistant trial judge advocate could in any way support the conclusion of lack of impartiality or thoroughness during the pre-trial investigation. Cf. *Keyes* v. *United States*, 109 U. S. 336, 340; *Benjamin* v. *Hunter*, 169 F. 2d 512, 514 (C. A. 10).

(c) The third ground relied on as showing lack of impartiality and thoroughness on Todd's part during the pre-trial investigation—namely, that he participated to some extent in the preliminary investigation preceding the filing of the formal charges which he later investigated as AW 70 investigator—is the only ground, in our opinion, having any plausibility. We submit, however, that it is equally lacking in merit.

Todd's participation in the preliminary investigation was strictly limited and incidental. It consisted, in essence, of routine cooperation, in his capacity as Provost Marshal of respondent's station, with the British police and agents of the Army's Criminal Investigation Division, who were the true preliminary investigators of the offenses. Todd's cooperation, moreover, was limited to the final few hours of a week-long investigation. The investigation had been in progress for a week before Todd ever heard of the incidents that were being investi-

gated. He first learned about the matter under investigation when the two British constables, who had been working on the case in conjunction with the C. I. D. agents, came to his office to ask his cooperation in calling and questioning various suspect soldiers. Todd did summon suspects as requested, and, with the constables, interrogated them. He further cooperated with them to the extent of conducting the identification line-up on the evening of the same day. But that was the full extent of Todd's assistance in the preliminary investigation. He merely cooperated briefly with

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It is not true that Todd interrogated the English girls on the evening of the line-up or at any other time prior to his appointment as AW 70 investigator. The majority below were simply mistaken in saying that Todd "would seem to have interviewed the girls that same evening [*i.e.*, the evening of the line-up]" (R. 278). This conclusion of the majority is based on the fact that Todd certified copies of the Dale and Cullum girls' original and supplementary statements to the British constable, Felton, as being true copies of such statements. Manifestly, however, as indicated by the dissenting judge below (R. 286), this in no way indicates that Todd participated in the taking of the statements or that he was even present when they were taken. The circumstances under which the Dale and Cullum statements were taken and how Todd's name happened to appear on copies of them are fully explained in the Statement, *supra* (pp. 5, 6, 7, and note 3, pp. 7-8), and it is clear that Todd certified the copies of those statements as being true copies after he was appointed AW 70 investigating officer. As Todd testified at the habeas corpus hearing, his certification was merely his attestation that the statements were "a true copy of something the Dale girl [and the Cullum girl] said to the Constable" (R. 36). Todd did not personally interrogate either girl until after he was appointed AW 70 investigating officer (note 3, *supra*, pp. 7-8).

the preliminary investigators. He clearly was not "the real accuser," as the majority below referred to him (R. 284). It was not Todd who preferred the charges against respondent, but the latter's commanding officer, Captain MacGregor (*supra*, p. 6). The fact that Todd, in cooperation with the British police and the C. I. D. agents, conducted the line-up at which respondent was identified as the guilty person in no way precluded him, we submit, from entering upon his duties subsequently as the AW 70 investigator with a fair and unbiased mind, as he testified he did (*supra*, p. 9). As the dissenting judge tersely observed (R. 286), "The girls made the identification, not Todd."

The decision below, to the extent that it holds that AW 70 was not substantially complied with because of the AW 70 investigating officer's brief participation in the preliminary investigation which preceded the AW 70 investigation, squarely conflicts with a recent decision of the Court of Appeals for the Second Circuit, *Henry* v. *Hodges*, decided November 29, 1948 (not yet reported, but printed in Appendix A, *infra*, pp. 28-34). In that case (see also *Henry* v. *Hodges*, 76 F. Supp. 968, 970-971 (S. D. N. Y.), which the Second Circuit reversed), a Captain Meyers was ordered to investigate certain shortages of silver bullion. In the course of his investigation, he interrogated numerous witnesses, including a Captain Henry. At the conclusion of the investigation, Meyers filed a re-

port "detailing at length the facts as he believed them to exist as the result of his investigation," and including among his "conclusions" the statement that "Capt. Henry appears to be the main figure in the affair." Following submission of this report by Meyers, Henry was charged with embezzling the bullion, and Meyers was appointed to conduct the pre-trial investigation under AW 70. The Second Circuit, pretermitting the question of whether compliance with AW 70 is jurisdictional, unanimously held that the fact that the AW 70 investigating officer had conducted the original investigation which resulted in the filing of formal charges against Henry did not disable him from subsequently conducting a "thorough and impartial" investigation of those charges as provided for by AW 70. "There is not a syllable," the Second Circuit said (*infra*, p. 31), "to support the conclusion that in this case Captain Meyers was unwilling [in his capacity as AW 70 investigating officer] to reconsider the conclusions to which he had come before [in his capacity as the preliminary investigator]."

Since the AW 70 investigating officer in the *Henry* case had been *the* preliminary investigator, it is evident that the facts in the *Henry* case presented a much stronger argument against the AW 70 investigator's ability to make the "thorough and impartial" investigation provided for by AW 70 than do the facts in the case at bar. There is

thus a plain conflict between the *Henry* decision and the decision below, and this Court should exercise its supervisory power to resolve the conflict.

2. *In any event, non-compliance with AW 70 is not a jurisdictional defect vitiating the court-martial proceedings.*—But even if it be assumed, *arguendo*, that AW 70 was not substantially complied with in this case, numerous considerations indicate that compliance with AW 70 is not a jurisdictional prerequisite to a valid court-martial trial.

Preliminarily, it should be pointed out that the pre-trial investigation of charges provided for by AW 70 is unique in our law.[1] The investigating officer's functions differ in important respects from the functions both of the grand jury and the committing magistrate in civilian criminal law.[2] But

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[1] It is peculiar, indeed, to Army law, there being no comparable procedure provided for in the Articles for the Government of the Navy (34 U. S. C. 1200).

[2] The AW 70 investigator, unlike the grand jury, does not, for example, make the charges; he merely investigates them after someone else (who may be "a person subject to military law"; AW 70, 10 U. S. C. 1542, 1st paragraph) has made them. And while the grand jury almost universally proceeds *ex parte*, the AW 70 investigator must afford the accused an opportunity to be heard and to present matters on his own behalf.

While the procedure followed by the AW 70 investigator is somewhat similar to that followed by the committing magistrate (compare Rule 5, F. R. Crim. P., with AW 70, *supra*, pp. 2-3), the AW 70 investigator has no power to discharge a prisoner, as does the committing magistrate. All the investigating officer can do is make a recommendation, which may be followed or disregarded by the appointing authority.

even to the extent that the functions may be analogized, the analogies do not favor the view that AW 70 is jurisdictional. For such irregularities in the return of an indictment as the unlawful impaneling of the grand jury (*Harlan* v. *McGourin*, 218 U. S. 442, 451) and disqualification of the grand jurors to sit (*Kaizo* v. *Henry*, 211 U. S. 146, 149) do not affect the jurisdiction of the court which tries the accused. See *Sunal* v. *Large*, 332 U. S. 174, 179. And it is well settled that even where there has been no preliminary hearing at all before a committing magistrate, the error is not jurisdictional. *Burall* v. *Johnston*, 146 F. 2d 230 (C. A. 9), certiorari denied, 325 U. S. 887; *Clarke* v. *Huff*, 119 F. 2d 204 (C. A. D. C.); *Garrison* v. *Johnston*, 104 F. 2d 128, 130 (C. A. 9), certiorari denied, 308 U. S. 553; cf. *Goldsby* v. *United States*, 160 U. S. 70, 73.

That Congress never intended, and still does not suppose, that compliance with AW 70 is a *sine qua non* of court-martial jurisdiction, to be enforced by the civil courts in habeas corpus proceedings perhaps years after the conviction, is indicated by numerous considerations:

(a) The language of AW 70 is not cast in jurisdictional terms. It does not say, "No general court-martial shall have power to try an accused until after a thorough and impartial investigation of the charges * * *," but merely that "No charge will be referred [i. e., by the appointing authority]

to a general court martial for trial until after a thorough and impartial investigation thereof * * *."

(b) The fact that no provision comparable to AW 70 is contained in the Articles for the Government of the Navy (34 U. S. C. 1200) strongly suggests its non-jurisdictional nature.

(c) While compulsory process is available to secure the attendance of witnesses at the trial (AW 22, 10 U. S. C. 1493), process which is enforceable by prosecution in the civil courts (AW 23, 10 U. S. C. 1494), Congress has given the accused, with respect to witnesses at the pre-trial investigation, merely the opportunity "to cross-examine witnesses against him *if they are available*," and has directed the investigating officer merely to "examine *available* witnesses requested by the accused" (AW 70, *supra*, pp. 2-3). Certainly it would be surprising if Congress intended to make jurisdictional a mere preliminary to trial which it left unimplemented by any effective sanction to compel testimony. The contrary intention is almost conclusively indicated.

(d) Whereas the accused at the trial is entitled to counsel, either appointed (AW 11, 10 U. S. C. 1482) or personally retained (AW 17, 10 U. S. C. 1488), he has not been entitled to counsel at the pre-trial investigation. Dig. Op. JAG (1912-1940), §428(3), par. 3; *Romero* v. *Squier*, 133 F.

2d 528, 532 (C. A. 9), certiorari denied, 318 U. S. 785.[10]

(e) In 1937, Congress amended AW 70 to dispense with investigations prior to trial by summary and special courts-martial. Act of August 29, 1937, c. 716, §2, 50 Stat. 724. The committee reports on the bill (H. Rep. 1517 and S. Rep. 65, 75th Cong., 1st sess.) show that Congress intended to dispense with what amounted in practice to two trials of comparatively minor offenses. But there is no suggestion in the reports that Congress supposed it was eliminating a jurisdictional prerequisite to trials by inferior courts-martial.

(f) In 1946, the House Committee on Military Affairs recommended "That article of war 70 be amended to provide that failure to comply with its requirements for a thorough and impartial investigation before trial shall be a jurisdictional error" (H. Rep. 2722, 79th Cong., 2d sess., p. 3). Obviously the committee did not consider AW 70 to be jurisdictional as it stands. In the following year, the House Committee on Armed Services

[10] Effective February 1, 1949, however, the accused will for the first time be entitled to counsel at the pre-trial investigation. Act of June 24, 1948 (Public Law 759, 80th Cong.), §§ 222, 244. Aside from thus guaranteeing to the accused the right to counsel at the pre-trial investigation, this Act—making numerous changes in the Articles of War, to take effect February 1, 1949 (see §§ 201-244)—makes no change in the pertinent language of AW 70. The Act merely transfers the pertinent language of AW 70 to a different Article, *viz.*, AW 46(b). See §§ 222 and 231.

said, "Should the pre-trial investigation be made mandatory * * * we have concluded that an investigation should precede every general courts-martial trial but that the investigation should be considered sufficient if it has substantially protected the rights of the accused. To hold otherwise would subject every general courts-martial case to reversal for jurisdictional error on purely technical grounds" (H. Rep. 1034, 80th Cong., 1st sess., p. 7). Thus, although the two reports differ diametrically in their recommendations, they join in recognizing that non-compliance with AW 70 is not a jurisdictional error under existing law.

Although the Judge Advocate General early held that, *where there had been no investigation at all*, the court-martial proceedings were void *ab initio* (Dig. Op. JAG (1912-1940), §428(1), par. 2, p. 292), later holdings, representing the current view, are uniform to the effect that non-compliance with AW 70 is not jurisdictional. *Floyd*, 17 B. R. 149; *Hawkins*, 13 B. R. (ETO) 57; *Warnock*, 17 B. R. (ETO) 163; *Rackman*, 72 B. R. 267.[11] Thus in the *Rackman* case (August 1947), it was stated (Appendix B, *infra*, p. 44):

> The pre-trial investigation directed by Article of War 70 is for the benefit of the appoint-

[11] In view of the inaccessibility of Board of Review holdings, the cited holdings are copied in pertinent part in Appendix B, *infra*, pp. 35-46.

> ing and referring authority and compliance with said article is not, in any sense, jurisdictional. It is an administrative procedure prescribed by Congress for the purpose of informing the appointing and referring authority as to the facts of an alleged offense against the Articles of War committed by a member of his command to the end that he may determine the proper course of disciplinary action. It is directory and not mandatory in its operation and confers upon an accused no rights the deprivation of which affects the jurisdiction of the court to which charges against him are referred for trial. * * *

These administrative interpretations of one of the Articles of War by the agencies of judicial review established by law within the Army are entitled to great weight, and the courts have in fact placed a very considerable reliance on opinions of the Judge Advocate General dealing with questions of military law. *Bowen* v. *Johnston*, 306 U. S. 19, 29-30; *Hironimus* v. *Durant*, 168 F. 2d 288, 289-291 (C. A. 4), certiorari denied October 11, 1948, No. 149, Oct. Term, 1948; *Stout* v. *Hancock*, 146 F. 2d. 741, 743-744 (C. A. 4), certiorari denied, 325 U. S. 850.

The decision below, moreover, in holding that non-compliance with AW 70 is a jurisdictional error vitiating the trial, is in conflict with the holding in *Waite* v. *Overlade*, 164 F. 2d 722 (C. A. 7), certiorari denied, 334 U. S. 812. The holding of that

case would seem to be contained in the following language of the opinion (164 F. 2d, at 723-724):

> On appeal appellant asserts that the court-martial was without jurisdiction to try him because proper procedures had not been followed with respect to pre-trial investigation [and for other reasons].
>
> * * * * * * * *
>
> The record on this appeal establishes that appellant was, at the time of the offense charged, subject to military law and to trial for that offense by a general court-martial. Hence, if properly constituted, there is no question as to the jurisdiction of the court of his person and of the offense.[12]

No appellate decision to the contrary has been found. A district court decision, *Anthony v. Hunter*, 71 F. Supp. 823 (D. Kans.), appears to be to the contrary (see pp. 830-831), though the decision, holding the court-martial sentence to be void, was manifestly influenced to a great extent by a finding of fundamental and vitiating unfairness at the actual trial (see pp. 824-827, 831). Another district court case, *Hicks v. Hiatt*, 64 F. Supp. 238 (M. D. Pa.), states that the provisions of AW 70 "are

[12] Later in the opinion, however, in what appears to be *dictum*, the court said (164 F. 2d, at 724): "If there was any relaxation of pretrial investigation requirements not waived by appellant (and we are not convinced that there was), it certainly was not of a nature seriously to impair any of his fundamental constitutional rights."

mandatory" (p. 242), but this statement is clearly *dictum*; for one thing, the whole opinion is *dictum*, since it was filed after the case had become moot (see p. 250, note 28); furthermore, apart from the mootness feature, what actually was held was that the court-martial sentence was void because of a complete denial of due process of law by reason of the "totality of errors" pervading the entire proceedings, including the pre-trial, trial, and review stages. *Benjamin* v. *Hunter*, 169 F. 2d 512, 514 (C. A. 10), also contains a *dictum* to the effect that substantial compliance with AW 70 conditions the jurisdiction of the court-martial, but Circuit Judge Murrah, who was on the panel which decided the *Benjamin* case, subsequently emphasized, in a concurring opinion in *DeWar* v. *Hunter* (not yet reported; decided November 3, 1948), the *obiter* nature of the statement in the *Benjamin* case and cautioned against reliance on the "isolated statement." "None of the cases cited," Judge Murrah said, "or which I have been able to find, hold or infer that failure to comply with Article 70 ousts the court-martial of jurisdiction * * *." *Reilly* v. *Pescor*, 156 F. 2d 632, 634-635 (C. A. 8), certiorari denied, 329 U. S. 790, and *Henry* v. *Hodges*, (C. A. 2; Appendix, *infra*, pp. 28-34), merely assume, *arguendo*, that compliance with AW 70 is jurisdictional. *Thompson* v. *Sanford*, 163 F. 2d 830 (C. A. 5), certiorari denied, 333 U. S. 856, was an affirmance, without opinion, of a decision discharging the writ

in a habeas corpus proceeding in which the relator relied on an alleged deprivation of rights during the pretrial investigation (see our brief in opposition to certiorari, No. 163 Misc., O. T. 1947). It is not possible to know, therefore, whether the Fifth Circuit's ruling was that compliance with AW 70 is not jurisdictional or merely that there was substantial compliance in that case.

CONCLUSION.

For the reasons stated, the court below erred both in holding that AW 70 was not substantially complied with in this case and also in holding that compliance with AW 70 conditions the jurisdiction of the court-martial. There is a clear conflict of decisions in respect of the first holding and a probable conflict in respect of the latter. The decision is unsupportable if erroneous in either respect. As a result of the decision, a person unquestionably subject to military law who has been convicted after a fair trial of serious violations of the Articles of War has been ordered discharged because of alleged procedural irregularities occurring long before, and having nothing to do with, the actual trial. The decision thus works a miscarriage of justice in the individual case and, in view of the nature of the offenses involved, is manifestly undesirable. It furthermore sets an extremely harmful precedent in establishing the federal courts as forums in which to reexamine the minutiae of pre-trial investigation and handling of charges arising in the

armed forces. So long as no fundamental injustice or unfairness has been committed, it is not the function of the great writ of habeas corpus to give judges the right to enforce their hindsight judgment as to how the pre-trial investigation should have been conducted by the competent military authorities. It is therefore respectfully submitted that this petition for a writ of certiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General.

December 1948.

APPENDIX A.

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 56—October Term, 1948.

(Argued Oct. 7, 1948 Decided Nov. 29, 1948.)

Docket No. 21086

FREDERIC HENRY, *Appellee*,

v.

GENERAL COURTNEY H. HODGES, *Appellant*.

Before L. HAND, SWAN and CHASE, Circuit Judges.

On appeal from an order of the District Court for the Southern District of New York, releasing on habeas corpus the relator from custody under the judgment of conviction of a general court-martial.

FREDERICK BERNAYS WIENER, for the appellant.
ROBERT N. GORMAN, for the appellee.

L. HAND, *Circuit Judge*: The respondent, who has custody of Henry, the relator, under a judgment of conviction of a general court-martial, appeals from an order, releasing Henry upon habeas

corpus. Only two questions are at issue: (1) whether Henry was deprived of that "thorough and impartial investigation," preliminary to convening a "general court-martial," which the Seventieth Article of War,[1] affords; and (2) whether the "general court-martial" before which he was tried was improperly constituted under the Eighth Article of War,[2] because the "law member" was not "an officer of the Judge Advocate General's Department." The district judge held with the relator on the first point, and with the respondent on the second; he has stated the underlying facts in an opinion,[3] and we need not repeat them here, but will proceed at once to discuss the issues they raise.

We shall not decide whether the "thorough and impartial investigation," prescribed by the Seventieth Article of War, is a condition upon the jurisdiction of a "general court-martial" such that its absence is a defect of jurisdiction, which exposes a subsequent conviction by the court to attack by habeas corpus. A majority of the Third Circuit has recently so held,[4] and we shall assume *arguendo* that they were right. What we do decide is that, when the accused has had the substance of that protection which the statute intended him to have,

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[1] § 1542, Title 10, U. S. Code.

[2] § 1479, Title 10, U. S. Code.

[3] 76 Fed. Supp. 968.

[4] Smith v. Hiatt, 170 Fed. (2)

formal defects do not touch the jurisdiction of the court.

Before charges were filed, Captain Meyers made an extended investigation of the occurrences in question. He examined a number of statements of witnesses taken by Captain Stavor; some of these witnesses he himself examined; some additional witnesses he examined on his own account; and he interviewed Henry personally at length. All this material he put together in a preliminary report, which, had he made it up after the charges were preferred, would have answered all the requirements of the Seventieth Article, as a "thorough and impartial investigation." However, he did not prepare it to be such an investigation, and his findings were tentative; it was only after the charges had been verified and filed, that he made that final report, whose sufficiency is now challenged. The first question is whether he was disqualified in this because of his preliminary report with its tentative conclusions.

There is no inherent reason to deny power to a judicial officer to review his own judgments, even though they be final and decide the very merits of the cause; at common law this was permissible.[5]

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[5] Fink v. Tod, 1 Fed. (2) 246, 249, 250 (C. A. 2); Pierce v. Delamater, 1 New York 17; Oakley v. Aspinwall, 3 N. Y. 547, 553 (semble); In re Carter's Will, 193 App. Div. 356, 358; In re Navroidi's Estate, 60 N. Y. Supp. (2) 344; Forde v. Commonwealth, 16 Grattan, 547, 551, 552; Burguieres v. Farrell, 85 S. W. (2) 952, 956 (Tex. Civ. App.); Galveston & H.

True, it has long been the custom to forbid it by statute and there are good grounds for so doing; but it still persists in the practice of bringing on a motion for a new trial for errors of law before the judge who made the original decision. Rightly or wrongly, judges are credited *pro tanto* with enough detachment to be able to re-examine impartially what they have done; at least when, as here, the final disposition will in the end be determined by others. There is not a syllable to support the conclusion that in this case Captain Meyers was unwilling to reconsider the conclusions to which he had come before; and we can see no reason to suppose that in result the "post-charges" report did not comply with the statute. Indeed, so far as Henry has any complaint whatever, it is not to that there never was that "thorough and impartial investigation" which must precede the convening of a general court-martial, but that there had been no separate "investigation" preliminary to the preferring of charges against him. The Seventieth Article provides that the charges "must be signed by a person * * * under oath either that he has personal knowledge of, or has investigated the matters set forth therein and that the same are true in fact to the best of his knowledge and belief." Another officer than Meyers verified the charges in question.

Inv. Co. v. Grymes, 64 S. W. 778 (Tex. Sup. Ct.); Graham v. Selbie, 67 N. W. 831 (So. Dak.); Edwards v. "His Wife," 9 La. Ann. 321.

and, although he probably did so with Meyers' "pre-charges" report before him, there is no reason to assume that the "investigation" which he was charged with making may not have been of the exhibits which were attached to Meyers' report rather than upon the bare report. We should have no warrant for assuming the contrary, or for holding that the charges were not regular.

Moreover, the issue is not in the case anyway, for Henry assented to the "post-charges" investigation without reserve. After Meyers had filed his preliminary report, after the charges had themselves been filed, and after he had been ordered to make the "post-charges" investigation, he showed his preliminary report to Henry, containing, as it did the twelve exhibits which fill eighty-four typed pages and which contained everything he had acted upon, and meant to act upon again (the testimony, the statements and the documents). He asked Henry whether he wished "to cross-examine any witness," and Henry said he did not; he named nine witnesses specifically whom he suggested that he might call, and he asked Henry whether he wished to cross-examine any of these, and Henry said he did not; finally, he asked Henry whether he wished to make any further statement of his own, and Henry said that he did not. It was only after this that he made the report on which the general court-martial was convened. That was dated October

more in detail, showing that he had gone over the ground again and repeating that Henry did not wish to make any "statement," although he had said that he meant to call four witnesses in his defense at the trial. Henry did not deny that he had been shown the preliminary report with its accompanying exhibits, or that he had not wished to cross-examine the witnesses, or that he had not refused to make any added statement on his own behalf. He did swear that he had asked Meyers to call four witnesses at the hearing under the Seventieth Article, and that Meyers refused; but Meyers denied this, and the court found against Henry. That finding concededly we should not reverse.

It is on such a showing that we are asked to hold that the substance of the protection which the Seventieth Article provides was so far denied Henry that the court-martial had no jurisdiction to proceed. Chief Judge Biggs in *Hicks v. Hiatt*,[3] held that, where the cumulation of incidents in a trial persuasively shows that the accused has been denied a fair trial, the conviction should be reversed, as wanting "due process of law." We do not mean to suggest that this is not a ground for declaring that the court did not have jurisdiction of the case, but here there was no shadow of oppression or of denial of "due process of law"; there was nothing which by any possibility could have prejudiced Henry in his defense. Unless we are to treat

every procedural defect, however trivial, as impairing the jurisdiction of the court, this is no case to intervene.

There remains the second question: the irregularity in the constitution of the court: i. e., whether any member of the Judge Advocate General's department was "available" at the time. We cannot say that it was not more in the interest of justice to detail Beatty to defend Feltman than to put him on the court; or that it was not better judgment to make Swan a prosecutor than a judge; and these were the only officers of the Department whom Henry claims to have been "available." The whole question is especially one of discretion; and, if it is ever reviewable, certainly the record at bar is without evidence which would justify a review. The commanding officer who convenes the court must decide what membership will be least to the "injury of the service," and what officers are "available." "Available" means more than presently "accessible"; it demands a balance between the conflicting demands upon the service, and it must be determined on the spot.

Order reversed; writ dismissed.

Martin v. Mott, 12 Wheat. 19; Mullan v. United States, 140 U. S. 240; Swaim v. United States, 165 U. S. 553; Bishop v. United States, 197 U. S. 334; Kahn v. Anderson, 255 U. S. 1.

APPENDIX B.

Floyd, 17 B. R. 149:

6. There is nothing in the record of trial and accompanying papers to show that the requirements of Article of War 70 for a pre-trial investigation of the charges were complied with, nor does it appear that the appointing authority referred the charges to his staff judge advocate for consideration and advice prior to reference for trial. Furthermore, before acting upon the proceedings, the reviewing authority, so far as appears, did not refer the record of trial to a staff judge advocate as required by Article of War 46. Ordinarily, a presumption of regularity in the performance of their duties by the officers responsible for the fulfillment of these requirements might be indulged (par. 112*a*, M. C. M.). The circumstances of this case, however, suggest that the requirements were not in fact complied with.

The requirements for reference of charges and records of trial to staff judge advocates have heretofore been held to be directory only and to have no effect upon the legality of the proceedings (CM 215720, *Pool*; CM 215721, *Klobucher*; CM 224823, *Greunebach*). However, in 1924, the Board of Review held that the provisions of Article of War 70 and paragraph 76*a*, Manual for Courts-Martial, 1921, relating to pre trial investigation, were juris-

dered the proceedings of the court void *ab initio* (CM 161728, *Clark*). Subsequently holdings of the Board of Review have reached the same result (CM 182225, *Keller*; CM 183183, *Claybaugh*). In neither of these latter cases was the holding based upon lack of jurisdiction; rather, the theory appears to have been that failure to comply with Article of War 70 was *per se* an error injuriously affecting the substantial rights of accused. Although these cases have not been expressly overruled, opinions on analogous points indicate that the first three paragraphs of Article of War 70 have come to be regarded as directory only in all respects and that failure to comply therewith is not fatal error. The following cases represent examples of this view; Sec. 376(3), Dig. Op. J. A. G., 1912-1940 (failure to swear witness not prejudicial error where facts admitted or otherwise proved); CM 172002, *Nickerson* (failure to sign or swear to charges); CM 201563, *Davis* (report of investigation by telephone instead of in writing); CM 202511, *Godfrey* (no reinvestigation after staff judge advocate had amended charges by changing the article of war and the name of the owner of stolen property); CM 206697, *Brown* (reference of charges to accuser for investigation). The *Nickerson* case contains the following apt language:

> "The provisions of A. W. 70 requiring the charges and specifications to be sworn to, was intended for the benefit of the accused in or-

der that he might not be subjected to frivolous or malicious prosecution and if he did not object to the irregularity and the accusation is sustained by the proof, the fact that the charge and specifications were not sworn to would not in itself injuriously affect any of the substantial rights of the accused." (CM 172002, *Nickerson*).

The reasoning in the *Nickerson* case applies with equal logic to the present case.

The foregoing cases, together with those holding that failure to make the required references to staff judge advocates is not fatal error, justify the conclusion that the investigation required by Article of War 70 is not mandatory, and that its omission does not constitute fatal error. This conclusion coincides with the apparent Congressional intention in enacting the statute, which was to prevent "unnecessary and unjust trials" based "on flimsy evidence without a prima facie case." (Hearings before the Senate Committee on Military Affairs on S. B. 5320, 65th Cong., 3rd Sess., p. 108; Hearings before the Subcommittee, Senate Committee on Military Affairs, on S. B. 64, 66th Cong., 1st Sess., pp. 101, 1390; Proceedings, Report of Special War Department Board on Courts-Martial and Their Procedure, July 17, 1919, p. 5). The requirements are wholly procedural and do not affect the processes of courts martial in their determinations of guilt or innocence. Although the language of a statute is mandatory it may be regarded as di-

rectory if the legislative purpose can best be carried out by such a construction (59 C. J. 1072). Moreover, the Supreme Court has held that the provisions of the Fourth, Fifth and Sixth Amendments to the Constitution, which are mandatory in form and some of which involve procedural matters, are not limitations upon the jurisdiction of the trial court and may be waived (see, for example, *Trono* v. *United States*, 199 U. S., 521; *Diaz* v. *United States*, 223 U. S., 442; *Segourola* v. *United States*, 275 U. S. 106; *Johnson* v. *Zerbst*, 304 U. S. 458). In *United States* v. *Gill*, 55 Fed. (2nd) 399, a United States district court has expressed the view that indictment by a grand jury (a procedure basically similar to investigation of charges) may be waived. In reaching this conclusion the court applied the reasoning of the Supreme Court in *Patton* v. *United States*, 281 U. S. 276, a case pertaining to waiver of trial by jury in criminal cases, guaranteed by section 2, Article III of the Constitution. In that case the Supreme Court said, among other things:

> "The record of English and colonial jurisprudence antedating the Constitution will be searched in vain for evidence that trial by jury in criminal cases was regarded as a part of the structure of government, as distinguished from a right or privilege of the accused. On the contrary, it uniformly was regarded as a valuable privilege bestowed upon the person accused of the oppressive power of

> the King and the arbitrary or partial judgment of the court. Thus Blackstone, who held trial by jury both in civil and criminal cases in such esteem that he called it 'the glory of the English law', nevertheless looked upon it as a 'privilege,' albeit, 'the most transcendent privilege which any subject can enjoy.'
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> * * * * * * * * *
>
> "In the light of the foregoing it is reasonable to conclude that the framers of the Constitution simply were intent upon preserving the right of trial by jury primarily for the protection of the accused.
>
> * * * * * * * * *
>
> "Upon this view of the constitutional provisions we conclude that Article III, Section 2, is not jurisdictional, but was meant to confer a right upon the accused which he may forego at his election. To deny his power to do so, is to convert a privilege into an imperative requirement" (*Patton v. United States*, 281 U. S., 276, 296-298).

For the foregoing reasons it is the opinion of the Board of Review that the provisions of Article of War 70 requiring investigation of the charges before trial are not jurisdictional, and that under the circumstances of the present case failure to comply with them did not injuriously affect the substantial rights of accused. To quote from a penetrating review by the staff judge advocate in the *Brown* case (CM 206697):

"If * * * a thorough and impartial investigation is not had, [and] nevertheless the charges are referred for trial, a fair trial is had which results in conviction, and the sentence is approved; all that the accused has suffered is *injuria sine damno*, a technical wrong which did him no harm. The law ought not to admit that a guilty man is harmed if tried, convicted, and sentenced; and, if he has had a fair trial and has been convicted, the law, if it does not stultify itself, must assume him to have been guilty. The case therefore falls within the exact language of A. W. 37. * * * It was no part of the purpose of the authors of A. W. 70 to prevent the trial, conviction, and punishment of a guilty man."

In so far as the *Clark*, *Keller* and *Claybaugh* cases are in conflict with this holding, they should no longer be followed.

It may be noted that the appellate jurisdiction granted to the Board of Review by Article of War 50-½ relates entirely to the "record of trial" and on its face is not concerned with extraneous matters of procedure. However, the conclusions of the Board are not based upon this ground.

* * * * * * *

Hawkins; 13 B. R. (ETO) 57:

* * * * * * *

7. The papers accompanying the record of trial show that the charge laid under the 75th Article of War was investigated as required by AW 70 and

par. 35, MCM, 1928. Thereafter the staff judge advocate cancelled the charge thus investigated and submitted to the Commanding General of the 35th Infantry Division the charge under Articles of War 58 28 upon which accused was arraigned and tried. The charge sheet was not resigned and was not re-verified by the accuser and no further investigation was made of the new charge. It has been established that the investigation of the charges is an administrative process intended primarily for the benefit of the appointing authority and is not jurisdictional (CM 229477, *Floyd*, 17 B. R. 149). It has also been determined that:

> "The provision of AW 70 requiring the charges and specifications to be sworn to, was intended for the benefit of the accused in order that he might not be subjected to frivolous or malicious prosecution, and if he did not object to the irregularity and the accusation is sustained by the proof, the fact that the charge and specifications were not sworn to would not in itself injuriously affect any of the substantial rights of the accused" (CM 172002, *Nickerson*).

The *Nickerson* and *Floyd* cases, above cited, definitely determine that the requirements of the first three paragraphs of the 70th Article of War are directory and not mandatory and the failure to observe all or any of them neither deprives the court of jurisdiction nor do such defects and imperfec-

tions by the pre-trial procedure necessarily prejudice the substantial rights of an accused.

* * * * * * *

The Board of Review is clearly of the opinion that the practice followed in the instant case affords no reason for disturbing the findings of the Court that accused was guilty of desertion.

* * * * * * *

Warnock, 17 B. R. (ETO) 163:

* * * * * * *

The foregoing holdings support the conclusion that violations of the provisions of the 70th Article of War do not affect the jurisdiction of the court, and except under extraordinary or unusual circumstances do not constitute error prejudicial to the substantial rights of accused. This conception of the 70th Article of War views the requirements thereof as administrative in nature and of immediate concern to the authority holding general court-martial jurisdiction. Many of the provisions are intended for his benefit in order to enable him to act fairly and intelligently upon the charges. Other requirements of the Article are for the benefit of the accused and are intended to protect him against unwarranted or malicious prosecution of unfounded charges. It is the duty and function of the authority referring the charges for trial to insist that there be reasonable compliance in good faith with this Article of War in preparing and investigating the charges. Usually the require-

ments of the 70th Article of War do not concern the court after reference of the charges to it for trial. The action of the appointing and referring authority is binding upon the court in respect to such matters (CM ETO 4570, *Hawkins*, supra; CM ETO 5155, *Carroll* and *D'Elia*, supra).

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Buckman, 72 B. R. 267:

* * * * * * *

We might dispose of the defense contention that the investigation was inadequate, upon accused's own statement that he agreed with the investigating officer not to interview witnesses other than the two mentioned. However, the foregoing matters are set forth in considerable detail, not for the purpose of showing that there had been sufficient compliance with the provisions of Article of War 70 to vest the court with jurisdiction to try accused, but to illustrate the wide-spread misconception of the purpose and intent of Article of War 70. It is not the function of the court-martial, once a case has been referred to it for trial, to try and determine whether the appointing authority, in the exercise of his power to refer a case for trial, has breached the bounds set forth by Article of War 70. The pertinent part of the Article reads, "No charge will be referred to a general court-martial (by the referring authority) for trial until after a thorough and impartial investigation thereof shall have been made." (Parenthetical remark

supplied.) It does not say, "No general court-martial shall have power to try an accused until after a thorough and impartial investigation of the charge shall have been made." If an accused feels that he is not being given a fair and impartial investigation, that is a matter properly to be brought to the attention of the appointing authority before trial of the case, with such request as the accused deems appropriate. In other words, the sufficiency of the investigation is a matter of primary and vital concern to the accused and to the authority directing such investigation. If accused believes he is the victim of capricious and ill founded charges, he can invoke the provisions of Article of War 121 directing his complaint, through channels, even to the War Department.

The pre-trial investigation directed by Article of War 70 is for the benefit of the appointing and referring authority and compliance with said article is not, in any sense, jurisdictional. It is an administrative procedure prescribed by Congress for the purpose of informing the appointing and referring authority as to the facts of an alleged offense against the Articles of War committed by a member of his command to the end that he may determine the proper course of disciplinary action. It is directory and not mandatory in its operation and confers upon an accused no rights the deprivation of which affects the jurisdiction of the court to which charges against him are referred for trial.

And, a fortiori, the failure of the appointing or referring authority to comply with the provisions of said article does not constitute ground for annulling a sentence by general court-martial otherwise valid and enforceable.

For a discussion of the legislative intent of Article of War 70 see CM 229477, *Hoegh*, 17 BR 149, 156, wherein it is shown that the provisions of Article of War 70 are entirely administrative in character, not affecting the jurisdiction of general courts-martial, and in which it is also noted that the appellate jurisdiction granted to the Board of Review by Article of War 50-½ relates entirely to the "Record of trial" and is not concerned with extraneous matters of (administrative) procedure. A contrary view would allow a defect in a purely administrative and preliminary hearing to vitiate the judicial proceeding. Analogies cannot be effectively drawn between the investigation required by Article of War 70 and the grand jury procedure required by the Fifth Amendment to the Constitution of the United States. The Fifth Amendment specifically excepts cases arising in the land and naval forces from the grand jury requirements. The State and Federal courts empanel grand juries and, within the purview of the various statutory and code provisions, supervise the conduct of such bodies. In military jurisprudence, the court-martial ordered to try a given case may not have been in existence during the investigation and as has

been stated has no relation thereto. To be sure, an accused, upon representations made to the court that due to inadequacy of the investigation he is unable to properly prepare his defense and is not ready to proceed, may justly be entitled to a continuance for the purpose of securing witnesses or producing evidence, for the court must safeguard accused's right to a fair trial. But a plea in bar of trial upon the ground of defective investigation, if granted, would amount to an unauthorized invasion of the prerogatives of the appointing or referring authority. The function of the court is to "well and truly try and determine, according to the evidence, the matter now before" it, between the United States of America and the person to be tried, and "to administer justice, without partiality, favor or affection, according to the provisions of the rules and articles for the government of the armies of the United States * * *" (AW 19). Its function does not include a determination of whether the appointing or referring authority ordered trial without a fair and impartial investigation.

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No. 457

In the Supreme Court of the United States

OCTOBER TERM, 1948

WILLIAM H. HIATT, WARDEN, UNITED STATES PENITENTIARY, LEWISBURG, PENNSYLVANIA, PETITIONER

v.

BERNARD W. SMITH

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM SUGGESTING A QUESTION OF ABATEMENT

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MEMORANDUM SUGGESTING A QUESTION OF ABATEMENT

The Solicitor General is submitting this memorandum for the purpose of suggesting a question of abatement which appears to be present in this case.

The proceeding originated with the filing of a petition for a writ of habeas corpus (R. 2–5) to secure the release of the relator Smith, respondent herein, from the custody of William H. Hiatt, the then Warden of the United States Penitentiary at Lewisburg, Pennsylvania, who was holding the relator pursuant to the judgment and

sentence of an army general court-martial. After a hearing, the District Court, on August 7, 1947, denied the petition (R. 275). On appeal, the Court of Appeals for the Third Circuit, on September 14, 1948, reversed the judgment of the District Court and remanded the cause with directions to discharge the relator (R. 287). On December 10, 1948, the Government filed a petition for a writ of certiorari on behalf of Warden Hiatt, the mandate of the Court of Appeals having in the meantime been stayed.

Since the filing of the petition for a writ of certiorari, it has been brought to the attention of the Solicitor General that on April 28, 1948, while the case was pending on appeal before the Court of Appeals, Mr. Hiatt was transferred from the United States Penitentiary at Lewisburg, Pennsylvania, to the United States Penitentiary at Atlanta, Georgia, where he succeeded Joseph W. Sanford as Warden, and was succeeded as Warden of the Lewisburg Penitentiary by George W. Humphrey, formerly Warden of the Federal Correctional Institution, Sandstone, Minnesota. Under Rule 25 (d) of the Federal Rules of Civil Procedure,[1] the respondent Smith

[1] Rule 25 (d) provides as follows:

"When an officer of the United States, the District of Columbia, a state, county, city, or other governmental agency, or any other officer specified in the act of February 13, 1925, ch. 229, § 11 (43 Stat. 941), U. S. C., Title 28, § 780, is a party to an action and during its pendency dies, resigns, or otherwise ceases to hold office, the action may be continued and

had six months from the time Mr. Humphrey succeeded Mr. Hiatt as Warden of the Lewisburg Penitentiary, *i. e.*, until October 28, 1948, to move for the substitution of Mr. Humphrey. Since no such motion has been made, a question arises as to whether the action has abated beyond possibility of revival.

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maintained by or against his successor, if within 6 months after the successor takes office it is satisfactorily shown to the court that there is a substantial need for so continuing and maintaining it. Substitution pursuant to this rule may be made when it is shown by supplemental pleading that the successor of an officer adopts or continues or threatens to adopt or continue the action of his predecessor in enforcing a law averred to be in violation of the Constitution of the United States. Before a substitution is made, the party or officer to be affected, unless expressly assenting thereto, shall be given reasonable notice of the application therefor and accorded an opportunity to object."

Section 11 of the Act of February 13, 1925 (28 U. S. C., 1946 ed., 780 (a)), to which reference is made in Rule 25 (d), and which was repealed as of September 1, 1948, by the 1948 Revision of Title 28 of the United States Code (Act of June 25, 1948, Public Law No. 773, 80th Cong., 2d sess., §§ 38 and 39), similarly provided for substitution of a successor public officer for his predecessor and specified the same six-month time limit, but differed from the Rule in that the time as of which the six-month period commenced to run was fixed by the statute as the date of the death or separation from office of the predecessor officer. Some doubt has been entertained by the Government as to whether the Rule or the statute governed substitutions in the appellate courts in cases where the disparity mentioned was significant (see our memorandum in opposition to the granting of certiorari in *Fowler* v. *Gill*, No. 334, O. T. 1946, fn. 4; compare *United States ex rel. Trinler* v. *Carusi*, 168 F. 2d 1014, 1015 (C. A. 3)); but there is some authority that the Rule superseded the statute as the controlling authority in the matter of substitu-

This question must be considered in the light of *United States ex rel. Claussen* v. *Curran*, 276 U. S. 590, *Matheas* v. *United States ex rel. Cunningham*, 282 U. S. 802, and *United States ex rel. Volpe* v. *Smith*, 289 U. S. 422, 426, all involving habeas corpus actions in which there was a failure to substitute within the prescribed six-month period.

In the *Claussen* case, the respondent in the habeas corpus action was Henry H. Curran, Commissioner of Immigration. The District Court dismissed the writ on February 1, 1926; the Court of Appeals affirmed the judgment on December 14, 1926, and this Court granted a writ of certiorari on March 7, 1927. While the case was pending in this Court, the Solicitor General filed a suggestion of abatement, pointing out that the respondent Curran had resigned his office on March 31, 1926, while the case was before the Court of Appeals, and that one Day had succeeded him at that time. The Solicitor General

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tions not only in the district courts but in the appellate courts as well. See p. A239 of H. Rep. 308, 80th Cong., 1st sess., accompanying H. R. 3214, where it is explained that the reason for the repeal of the substitution statute by the 1948 Revision of Title 28 of the United States Code was the fact that it had been "superseded by Rules 25 and 81 of the Federal Rules of Civil Procedure." See also *Fleming* v. *Mohawk Co.*, 331 U. S. 111, 119. The 1925 Act, which was in effect on the critical dates, for purposes of abatement, involved in *Daggs* v. *Klein*, and *Braito* v. *Klein*, Nos. 411 and 412, this Term, in which certiorari was denied on January 10, 1949, clearly does not apply here.

stated in his suggestion of abatement that he was "willing to have the cause continued in the name of Benjamin M. Day, Commissioner of Immigration, as respondent, and, in so far as his consent may be effective for that purpose, the Solicitor General hereby gives such consent" (Suggestion of Abatement, No. 166, O. T. 1927, p. 2). Notwithstanding this expression of willingness to have the cause continued, however, this Court entered an order reading in pertinent part as follows (276 U. S. 590–591):

> It appearing that Henry H. Curran, sued herein as Commissioner of Immigration, resigned such office on March 31, 1926, and was succeeded by Benjamin M. Day, who now holds that office, and that no motion was made under § 11 of the act of February 13, 1925 (c. 229, 43 Stat. 936, 941), asking the Court to "permit the cause to be continued and maintained by or against the successor in office of such officer," and that the six months' period, within which such a motion could have been made, has expired, the Court now vacates the judgments entered in the District Court and in the Circuit Court of Appeals and remands the cause to the District Court with a direction to dismiss the cause as abated.

In the *Matheus* case, the respondent in the habeas corpus action was W. Frank Matheus, United States Marshal for the Eastern District of Pennsylvania. The District Court dismissed

the petition for the writ on May 10, 1928, the Court of Appeals reversed the judgment on June 13, 1930, and a petition for a writ of certiorari was filed in this Court on behalf of the respondent Matheus on September 12, 1930. At this juncture the fact that Matheus' term of office as Marshal had expired on March 2, 1930, was first discovered by the parties. On September 24, 1930, the Court of Appeals, by agreement of the parties,[2] entered an order substituting Matheus' successor, Fetters, *nunc pro tunc* as of March 3, 1930, the date he took office. But since the six-month period for substitution allowed by statute had already expired on September 2, 1930, the Solicitor General, on October 4, 1930, suggested to the Court of Appeals that the action had abated. That court, however, declined to act on the suggestion while the petition for certiorari was pending in this Court.[3] The suggestion of abatement was then made to this Court, and on the authority of the *Claussen* case, this Court entered an order (282 U. S. 802) vacating the judgments of the Court of Appeals and the District Court and remanding the cause to the District Court with directions to dismiss the proceeding as abated.

[2] The facts recited are taken from the Suggestion of Abatement, No. 451, O. T. 1930.

[3] The situation presented in the recent case of *United States ex rel. Trinder v. Carusi*, 168 F. 2d 1014 (C. A. 3), was basically similar to the situations in the *Claussen* and *Matheus* cases, except for the fact (which we deem imma-

However, in the later case of *United States ex rel. Volpe v. Smith*, 289 U. S. 422, where the facts differed from those in the *Claussen* and *Mathues* cases in one important respect, this Court held there was no abatement. The habeas

terial) that the action there involved was a proceeding for judicial review of a deportation order under Section 10 of the Administrative Procedure Act. In the *Trinler* case, the District Court had ruled that the Administrative Procedure Act does not authorize judicial review of a deportation order and dismissed Trinler's action brought for that purpose against Ugo Carusi, the then Commissioner of Immigration and Naturalization. The Court of Appeals reversed this judgment on February 16, 1948. The Solicitor General was about to file a petition for a writ of certiorari in this Court when it was discovered that the respondent Carusi had resigned his office as Commissioner and been succeeded by Watson Miller on August 27, 1947, more than six months previously, and that no substitution had been effected. The Solicitor General reluctantly called this fact to the attention of the Court of Appeals on June 21, 1948. That court of Appeals then entered an order recalling its mandate, vacating its own judgment and the judgment of the District Court, and remanding the cause to the District Court with directions to dismiss the cause as abated.

The Court of Appeals said in its opinion that there was much to be said for the view that "the real party in interest is the Attorney General of the United States who has held office throughout the whole of the proceeding; that the Commissioner of Immigration and Naturalization is but an arm or an agent of the Attorney General who is the real party respondent in the case and that the ends of justice would be best served by penetrating the form and looking solely to the substance of the action" (168 F. 2d. at 1015), but ruled as it did on the authority of its own substitution rule (which incorporated by reference the now-repealed substitution statute referred to in note 1, *supra*, pp. 2-4) and this Court's decision in the *Claussen* case.

corpus proceeding in the *Volpe* case was against S. D. Smith, District Director of Immigration at Chicago. The District Court dismissed the writ on June 16, 1931. The Court of Appeals, after first reversing the judgment on June 21, 1932, later affirmed it, on rehearing, on January 11, 1933. Volpe thereafter filed a petition for a writ of certiorari in this Court. The Solicitor General then filed a Suggestion of Abatement (No. 724, O. T. 1932), stating that while the case was pending on appeal in the Court of Appeals, the respondent S. D. Smith had "ceased to hold office as District Director of Immigration in January, 1932"; that he "was succeeded by C. Alfred Palmer, who was appointed January 14, 1932, entered upon the duties of the office February 1, 1932, and took the oath of office March 3, 1932"; and that no substitution had been effected within the six-month period allowed for that purpose, the period having long since expired. The *Claussen* and *Matheus* cases, as well as *LeCrone* v. *McAdoo*, 253 U. S. 217, 219,[1] were cited as authorities for the proposition that the failure to substitute required abatement of the action. Volpe filed a reply brief opposing the suggestion of abatement, and this Court granted

[1] The *LeCrone* case, a mandamus suit against Secretary of the Treasury McAdoo, involved, like the *Claussen* case, a situation where the respondent official had resigned his office and there had been no substitution within the period allowed, with the consequence that this Court held "the whole proceeding [to be] at an end."

certiorari. In Appendix B to the Solicitor General's brief on the writ, the question of abatement was more fully discussed. It appears from this Appendix (p. 43) that although the respondent S. D. Smith had ceased to hold office as District Director of Immigration at Chicago, he had not resigned or severed his connection with the Department of Labor, or indeed with the Immigration Service, but had been "appointed District Director of Immigation at Salt Lake City, Utah"; that is, he had merely been transferred from one Office in the Immigration Service to another Office, retaining the same title as previously, except for the geographical area under his supervision. The Solicitor General further stated (Appendix B, pp. 44–47) that:

> The present suit was obviously brought to prevent the present or future discharge by the respondent Smith of his duties with reference to the execution of the warrant of deportation. The warrant is not self-executing, and the immigration officer in charge of the particular district where a deportation proceeding has taken place has certain duties which are imposed upon him in connection with deportation by the regulations of the Secretary of Labor. To enumerate some of those duties in the ordinary case, he must secure a passport for the deportee, if a passport can be obtained locally; this passport must be forwarded to the port of departure (Rule 19, subdivision H, pars. 1, 2); and arrangements

must be made for the transportation of the deportee and his personal effects (Rule 19, subdivisions P and Q, Immigration Regulations, 1930). Special provisions are made in the regulations for the deportation of insane or diseased aliens (Rule 20, Immigration Rules, 1930); and if the alien is to be deported to Canada or Mexico, certain additional duties are imposed upon the immigration officer in charge of the district wherein the case originated (Rule 19, subdivisions I. and J, Immigration Rules of 1930). Obviously, it would tend to cause confusion in the administration of the immigration laws if the immigration officer in charge of one district could go into another district and perform the duties which under the regulations properly fall to the lot of another District Director. The regulations clearly do not contemplate that a District Director shall have a roving commission, although it may be conceded that there is no prohibition therein which would preclude Smith from going to his old district for the purpose of completing his duties in connection with this case.

In response to the suggestion of abatement petitioner contends that Smith has not "ceased" to hold the office of District Director of Immigration, even though he has been placed in charge of another district. This seems to ignore the fact that the instant suit was brought against Smith in connection with the discharge of duties

imposed upon him as District Director of Immigration in charge of the Chicago District. Apparently, he has ceased to hold that office quite as much as if he had been appointed to such a post as stenographer in the Salt Lake immigration office. It is true that he is still a District Director of Immigration, but the position which he now holds is so distinctly a different position as to require the taking of a new oath of office.

On its face, the warrant of deportation indicates that it may be executed by anyone in the immigration service, but there are practical difficulties attending execution which suggest that the broad form of the warrant does not necessarily control. As we have indicated, under the regulations the initial steps incident to the deportation of an alien, in the absence of exceptional circumstances, are taken by the immigration officer in charge of the district wherein the case originated, i. e., the district where the alien was arrested and the deportation proceedings were held. As will be seen from the memorandum dated April 12, 1933, prepared for the Solicitor of the Department of Labor at the request of the Solicitor General by the Chief of the Deportation Division of the Bureau of Immigration, which is printed as Appendix C,

the warrant of deportation is addressed not only to the District Director of Immigration in charge of the district having jurisdiction of the deportation proceedings but to "any officer or employee of the United States Immigration Service" merely as a protection to any such officer who may have charge of the custody of the deportee while he is being transported from the district where the deportation proceedings were held to the port of departure. The view that Smith may still execute the warrant of deportation even though he is not now District Director of Immigration in Chicago, because of the apparently broad grant of authority contained in the warrant, seems to leave out of consideration the purpose of that grant, as indicated by the regulations and practice with respect to the execution of deportation warrants. On the other hand, it seems by no means certain that these practical difficulties could not be overcome in the novel circumstances of this case. * * *

As in the *Claussen* case, the Solicitor General de it clear that it was only with reluctance t he felt it necessary to argue that the cause l probably abated, stating that "it would be irable to have the case disposed of on the rits and we should be glad to have the Court clude that there has been no abatement" (p.

This Court declined, however, in view of the cial facts in the *Volpe* case, to accept the

suggestion of abatement, stating (289 U. S., at 426):

> With hesitation, the Solicitor General suggested here that possibly the cause had abated, since S. D. Smith is no longer District Director of Immigration at Chicago, where he formerly held the petitioner in custody. The record indicates that Smith has continued to be an officer in the Department of Labor, although not presently stationed at Chicago. So far as we are advised, under existing regulations, he may carry into effect the order of deportation. Moreover, the cause was permitted to proceed without question, as instituted, long after Smith is said to have left Chicago; and the petitioner insists that no cause has been shown for abatement. The point, we think, lacks merit.

It thus appears that the question of whether or not a cause of action against a public officer has abated beyond possibility of revival, where there has been a failure to substitute his successor within the period allowed, may depend on whether the predecessor officer has severed his connection entirely with the agency, bureau or department involved, by resignation or otherwise (as in *Claussen*, *Mathews*, *McAdoo*, and *Trinler*), or whether he continues to be an officer in the agency, bureau or department in question, though by reason of his change of status within the department he no longer, strictly speaking, has the same official powers and functions, at least in

respect of the geographical area subject to his supervision, as he had when the action was originally brought (as in *Volpe*). The case at bar would seem to fall within the ambit of the *Volpe* case rather than the others which we have discussed. Here, Mr. Hiatt is no longer Warden of the United States Penitentiary at Lewisburg, Pennsylvania, but he has not resigned or severed his connection with the Bureau of Prisons or Department of Justice. He has merely been involved in a "within-the-family" transfer of Wardens, and remains subject, as before, to the control and supervision of the Director of the Bureau of Prisons, and ultimately of the Attorney General (see 18 U. S. C., 1943 Revision, 4001, 4041, 4042).[5] As in the *Volpe* case, the regulations of the Bureau of Prisons (see *Manual of Policies and Procedures for the Administration of the Federal Penal and Correctional Service* (1942)) do not contemplate that the Warden of a federal penitentiary shall have a "roving commission" with power to go to another penitentiary and perform duties which "properly fall to the lot of another" Warden (cf. Appendix B to our brief in the *Volpe* case, *supra*, p. 10). On the other hand, as in the *Volpe* case, it is equally true that there is no prohibition in the regulations which would

[5] We are advised by the Bureau of Prisons that when a Warden of a United States Penitentiary is transferred to another United States Penitentiary in the same capacity, a new oath of office is not required.

preclude Mr. Hiatt from returning to his former post "for the purpose of completing his duties in connection with this case" (cf. *ibid.*). The fact that the mandate of the Court of Appeals directing respondent Smith's discharge from custody is directed to Mr. Hiatt, who no longer has custody of Smith, poses no practical difficulty in connection with carrying out the mandate, and this would remain true in the event this Court should grant certiorari and affirm the judgment of the Court of Appeals. If considered necessary, it would be feasible for Mr. Hiatt to return, at the direction of the Director of the Bureau of Prisons, to Lewisburg Penitentiary for the limited purpose of effecting Smith's discharge in accordance with the mandate. Of course, if this Court should grant certiorari and reverse the judgment of the Court of Appeals, as we urge, there would be no problem, since in that event the order of the District Court, remanding Smith to custody, would become final. But the decisive factor, it would seem to us, is that this is a proceeding essentially against the United States, and, at least for purposes of substitution of parties, the cause has not "abated" in any real sense, simply because of the transfer of the warden against whom the petition was originally filed. See *Goodwin* v. *United States*, 165 F. 2d 334 (C. A. 8), certiorari denied, 334 U. S. 828.

We have no desire to have this cause abate, and it was due only to inadvertence that the Government (in the absence of any action by respondent or his counsel) did not take timely steps to effect substitution of Mr. Hiatt's successor. The consequence of a determination that the cause has abated will be merely that the habeas corpus proceeding will have to be re-instituted with Mr. Humphrey as the party respondent, but without any change in the substantive issues involved. This result seems so highly undesirable that any legal justification for a holding that the cause has not abated should, we submit, be here invoked. We believe, for the reasons stated, that there is a valid basis for such a holding, on the authority of the *Volpe* case. Nevertheless, we have deemed it our duty to bring the facts to the Court's attention for appropriate action.

If the Court should consider that the cause has not abated, the Government respectfully requests, in order that the caption of the case may reflect the present situation, that the present warden, George W. Humphrey, be substituted as party petitioner in this Court, in place of William H. Hiatt; and this memorandum may accordingly be treated as a motion for that purpose. If, however, the Court should consider that the cause has abated beyond possibility of revival, it is suggested that certiorari be granted, that the judgment of the Court of Appeals be vacated, and the

cause remanded to the District Court with directions to dismiss the cause as abated.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.

JANUARY 1949.

U.S. GOVERNMENT PRINTING OFFICE: 1949

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No. 457

In the Supreme Court of the United States

OCTOBER TERM, 1948

GEORGE W. HUMPHREY, WARDEN, UNITED STATES PENITENTIARY, LEWISBURG, PENNSYLVANIA, PETITIONER

v.

BERNARD W. SMITH

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR PETITIONER

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OPINIONS BELOW

The opinion of the District Court (R. 264-275) is reported at 72 F. Supp. 935. The majority (R. 277-284) and dissenting (R. 284-287) opinions in the Court of Appeals are reported at 170 F. 2d 61.

JURISDICTION

The judgment of the Court of Appeals was entered September 14, 1948 (R. 287). The petition

for a writ of certiorari was filed December 10, 1948, and was granted February 7, 1949 (R. 297). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the second paragraph of the 70th Article of War,[1] providing that "No charge will be referred to a general court martial for trial until after a thorough and impartial investigation thereof shall have been made," was complied with in this case.

2. Whether, assuming there was not at least substantial compliance with AW 70, the failure to comply was a fatal jurisdictional error which invalidated the subsequent court-martial proceedings.

STATUTE INVOLVED

The 70th Article of War (Act of June 4, 1920, c. 227, subch. II, § 1, Art. 70, 41 Stat. 759, 802, as amended by the Act of August 20, 1937, c. 716, § 2, 50 Stat. 724; 10 U.S.C., 1946 ed., 1542) provided at all times relevant hereto as follows:[2]

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[1] As explained in footnote 2, *infra*, what was formerly the second paragraph of this Article has, since February 1, 1949, been renumbered as AW 46b. However, for the reasons explained in footnote 2, we shall continue to refer to the provisions of the paragraph as though they were still contained in AW 70.

[2] Effective as of February 1, 1949, the first and second paragraphs of this Article, as copied in the text, and all of the fourth paragraph except the first two sentences, have been taken out of AW 70 and (with one amendment, to be noted) renumbered as AW 46a, AW 46b, and AW 46c, respectively. Act of June 24, 1948, c. 625 (Public Law 759, 80th Cong.), Title II,

Charges and specifications must be signed by a person subject to military law, and under oath either that he has personal knowledge of, or has investigated, the matters set forth therein, and that the same are true in fact, to the best of his knowledge and belief.

No charge will be referred to a general court martial for trial until after a thorough and

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§§ 222, 231, 244. The third paragraph of AW 70 has been similarly eliminated from that Article and (also with one amendment, to be noted) renumbered as AW 47b. *Id.*, § 223. Consequently, all that now remains of AW 70 as it formerly stood (and as copied in the text) is the first two sentences of the fourth paragraph. *Id.*, § 231.

Aside from the formal changes mentioned—consisting of the transfer of most of the provisions of former AW 70 to more logical places in the framework of the Articles of War (see Appendix B, *infra*, at p. 98)—the only amendments of former AW 70 that have been effected by the 1948 Act (which, however, made numerous changes in other Articles of War, all effective as of February 1, 1949, see §§ 201-244) have been the two following: (1) The insertion, between the second and third sentences of the second paragraph of former AW 70 (now AW 46b), of the following new provision: "The accused shall be permitted, upon his request, to be represented at such investigation by counsel of his own selection, civil counsel if he so provides, or military if such counsel be reasonably available, otherwise by counsel appointed by the officer exercising general courts martial jurisdiction over the command." (2) The addition, at the end of the third paragraph of former AW 70 (now AW 47b), of the following new provision: "and no charge will be referred to a general court-martial for trial unless it has been found that a thorough and impartial investigation thereof has been made as prescribed in the preceding article, that such charge is legally sufficient to allege an offense under these articles, and is sustained by evidence indicated in the report of investigation."

The former AW 70 governs this case and, since it is referred to throughout the record as being part of "AW 70," we shall, in order to avoid confusion, continue thus to refer to it, except where the particular point under discussion requires that it be referred to under its new AW number.

thereafter duly approved and published (R. 39-41), and the United States Penitentiary at Lewisburg, Pennsylvania, was designated as the place of confinement (R. 40, 73). On March 26, 1946, by order of the Secretary of War, at the direction of the President, so much of the imprisonment portion of the sentence as was in excess of 16 years was remitted (R. 38-39).

On January 2, 1947, respondent filed in the District Court for the Middle District of Pennsylvania a petition for a writ of habeas corpus (R. 2-5), which gave rise to the present proceeding. So far as is now pertinent, the petition challenged the jurisdiction of the court-martial on the ground that the second paragraph of the 70th Article of War, *supra*, pp. 3-4, providing in pertinent part that "No charge will be referred to a general court martial for trial until after a thorough and impartial investigation thereof shall have been made," had not been complied with. Specifically, it was alleged that Lieutenant Todd, the officer who conducted the AW 70 investigation, "was the accuser in fact and the original investigator of the alleged crime" and consequently "was ineligible to be the impartial investigator under the 70th Article of War," and, further, that Todd's AW 70 investigation "was neither thorough nor impartial and * * * was not competently made" (R. 4). This was the first occasion on which any attack on the jurisdiction of the court-martial was made, no such at-

tack having been made at any time during the court-martial proceedings themselves.[3]

A rule to show cause issued (R. 6) and a response to the petition and rule was filed (R. 6-8). The response denied the pertinent allegations of the petition, and affirmatively averred that "Lieutenant Todd did not conduct the preliminary investigation which was conducted by agents of the Criminal Investigation Division [of the United States Army]" and that the "pre-trial investigation was regularly, impartially, competently and completely conducted * * *" (R. 8). Following a hearing (R. 9-37), at which respondent (R. 11-30) and Todd (R. 31-37) testified and the entire court-martial record (R. 37-260) was received in evidence, the District Court (Follmer, D. J.) entered an opinion and order (R. 264-275) finding that AW 70 had been satisfied, dismissing the rule to show cause, and denying the petition for the writ.

On appeal, the Court of Appeals for the Third Circuit, one judge dissenting (R. 284-287), reversed the order of the District Court and remanded the cause with the direction to discharge respondent from

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[3] Respondent was represented at the court-martial trial by three counsel. Captain Kapelman was Defense Counsel, Lieutenant Crollard was Assistant Defense Counsel, and Lieutenant Lieberman was Associate Defense Counsel (R. 112, 113). Kapelman and Crollard were appointed by the court, and Lieberman was personally retained (R. 24, 113). Crollard and Lieberman were both lawyers, the latter with ten years' experience (R. 35, 262). The record does not indicate whether Kapelman was a lawyer (see R. 269).

asked leave to accompany them but had been refused. He started to follow them, however, and after Mrs. Kerry parted company with Miss Cullum to go to her own home, he continued to follow Miss Cullum and commited the assault a short while later. (R. 164-169.) Less than an hour after the assault upon Miss Cullum, another English girl, Sheila Dale, was attacked and raped by a soldier at the same location (R. 119-127, 97). The rape of the Dale girl was reported to the British civilian police on the following morning, July 12, 1944 (R. 96, 191), and on that day a British constable named Felton started an investigation (R. 96-97, 191) which culminated one week later, on July 18, in the identification of respondent as the assailant of both girls (see p. 13, *infra*).

Felton, on the morning of July 12, interviewed and took a statement from Dr. Beckett, the physician who examined the Dale girl (R. 95-96), interviewed and took a statement from Miss Dale (R. 91-93), took possession of certain material evidence, consisting of the skirt and knickers Miss Dale was wearing when raped (R. 191), and received from Miss Dale a description of her assailant (R. 199). That afternoon, accompanied by Miss Dale and another British policeman named Chaplin, Felton visited the scene of the attack (R. 96-97, 191-192), observed that the nearest house, known as the Marsh Cottage, was about 100 yards distant (R. 97, 192), and went to Miss Dale's home,

folk" (R. 97). Lieutenant Alan Todd was the Provost Marshal of this station (R. 31), and it was he who subsequently conducted the AW 70 investigation with which this case is concerned (*infra* p. 141). Felton and Chaplin went to Todd's office, told Todd about the attacks on the two English girls by an American soldier, explained that "an investigation had been started by the C. I. D.," and stated that they, the constables, "were on the Station to see if they could aid in the investigation in any way" (R. 31). This was Todd's first knowledge of the matter (R. 31, 32). The constables furnished Todd a description of the assailant as given to them by the girls, but Todd was unable, at first, to recognize any one stationed at the base as answering the description (R. 31). At the request of the constables, Todd summoned a number of soldiers stationed at the base for interviews, and Todd and the constables questioned them (R. 32, 200). At about 3:15 p. m., respondent was summoned for questioning (R. 32, 97, 200). Both Todd and the constables participated in the interrogation of respondent (R. 32). Respondent "seemed * * * to fit the description" as supplied by the girls (R. 32). Tending to confirm respondent's identity as the assailant were the fact that he had "a wound scab on the base of the thumb" of his left hand (R. 97, 193)[6] and the fact that the wound was not of a type

[6] Miss Cullum stated to Felton (*supra*, p. 41) that in the course of her struggle with her assailant she "bit his right hand" (R. 259). At the trial, she similarly testified that she

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that could have been inflicted "by the clean cut of a knife" (which was respondent's explanation of the cause of the wound) (R. 199).

At about 7:15 p. m. of the same day, July 18, in the presence of both British constables (R. 81, 97, 194), the two C. I. D. agents who had been investigating the cases (R. 81), and others (see p. 19, *infra*), Todd conducted a line-up, or identification parade, consisting of 16 soldiers, including respondent. At this time, both girls, independently of each other and without hesitation, identified respondent as their attacker[7] (R. 32-33, 81, 97, 194-196). Immediately following the girls' identification of respondent, both gave Felton brief additional statements, supplementing their original statements to him (*supra*, pp. 9, 11), attesting to the fact of their having identified respondent at the line-up (R. 93; R. 260, 90[8]).

On the following day, July 19, 1944, respondent's commanding officer, Captain Ernest MacGregor, who had been present at the identification parade at which respondent was identified as the assailant (R. 32, 81), filed formal written charges accusing respondent of the offenses (R. 73-76), and

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"bit his hand," but without specifying which (R. 167, 175). Asked on cross-examination if she "bit him on the right hand," she replied "I didn't say I bit him on the right hand. I just said I bit his hand" (R. 175).

[7] Both girls also identified respondent as their assailant at the trial (R. 127; 168).

[8] See "Stipulation correcting errors in the printed record" (R. 296).

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War Department, *Military Justice During the War* (1919) 66-67

5. The accused, after he had been carefully warned by me as above indicated, said that he did not desire to make a statement.

* * * * *

As indicated in the above-quoted excerpt from his report, Todd attached to and made a part of his report three exhibits, A, B, and C (R. 85-99, 258-260), which contained the substance of the statements given to him by the witnesses whom he had personally interrogated, and also certain documentary evidence examined by him, this documentary evidence consisting principally of certified copies of the statements previously given to constable Felton by the two girl victims and the five other English civilian witnesses whom Felton had interviewed. The contents of these three exhibits, more particularly described, were as follows:

Exhibit A (R. 85-89) contained Todd's summaries of the statements made to him by 15 of respondent's fellow soldiers, whom Todd personally interrogated at respondent's request, and by whose testimony respondent sought to establish an alibi.

Exhibit B (R. 258-260, 90-97) consisted of certified copies of (1) Miss Dale's original (*supra*, p. 9) and supplementary (*supra*, p. 13) statements to constable Felton (R. 91-93); (2) Miss Cullum's original (*supra*, p. 11) and supplementary (*supra*, p. 13) statements to Felton (R. 258-260, 90[9]); (3) the statements given to Felton by the

[9] See "Stipulation correcting errors in the printed record" (R. 296).

five other English civilian witnesses whom Felton had interrogated (*supra*, pp. 9-11) (Dr. Beckett, R. 95-96; Mrs. Ellen Dale, R. 94-95; Pamela Dale, R. 93-94; Betty Goodall, R. 96; Welham, R. 90); and (4) a statement by Felton himself summarizing his activities in connection with the investigation (R. 96-97).

Exhibit C (R. 97-99) consisted of summaries of statements given by Miss Dale and Miss Cullum to Todd in the course of his pre-trial investigation. These statements further supplemented their earlier statements to Felton, as contained in Exhibit B.

Beneath Miss Dale's statements to Felton (original and supplementary), as they appeared in Exhibit B to Todd's report, was the following notation (R. 93):[10]

> Original statements in the pocket book of P. c. 305 Felton, Pages Nos. 112-119, and 141, taken at 10.30 am. 12.7.44 at Dr. Beckett's Surgery, Manningtree, and at 7.45 pm. 18.7.44 at Raydon Aerodrome, respectively.
>
> Certified True Copy.
> (S.) E. W. SHEPHERD,
> *Detective Sergeant.*
>
> A True Copy.
> ALAN B. TODD,
> *1st Lt. Inf.*

Similar notations appeared beneath Miss Cullum's statements to Felton (original and supple-

[10] This is the notation which is reproduced in the majority opinion below (R. 278-279).

impartial investigation thereof shall have been made. This investigation will include inquiries as to the truth of the matter set forth in said charges, form of charges, and what disposition of the case should be made in the interest of justice and discipline. At such investigation full opportunity shall be given to the accused to cross-examine witnesses against him if they are available and to present anything he may desire in his own behalf either in defense or mitigation, and the investigating officer shall examine available witnesses requested by the accused. If the charges are forwarded after such investigation, they shall be accompanied by a statement of the substance of the testimony taken on both sides.

Before directing the trial of any charge by general court-martial the appointing authority will refer it to his staff judge advocate for consideration and advice.

When any person subject to military law is placed in arrest or confinement immediate steps will be taken to try the person accused or to dismiss the charge and release him. Any officer who is responsible for unnecessary delay in investigating or carrying the case to a final conclusion shall be punished as a court-martial may direct. When a person is held for trial by general court-martial the commanding officer will, within eight days after the accused is arrested or confined, if practicable, forward the charges to the officer exercising general court-martial jurisdiction and furnish the accused a copy of such charges. If the same be not practicable, he will report to superior

authority the reasons for delay. The trial judge advocate will cause to be served upon the accused a copy of the charges upon which trial is to be had, and a failure so to serve such charges will be ground for a continuance unless the trial be had on the charges furnished the accused as hereinbefore provided. In time of peace no person shall, against his objection, be brought to trial before a general court-martial within a period of five days subsequent to the service of charges upon him. [Italics supplied.]

STATEMENT

On August 26, 1944, the respondent, Bernard W. Smith, a private in the United States Army, was convicted in England by an Army general court-martial of rape and assault with intent to commit rape, in violation of the 92d and 93d Articles of War (10 U. S. C., 1946 ed., 1564 and 1565), respectively, and was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and imprisonment for life (R. 73-75, 251-252). The proceedings and record of the trial were thereafter reviewed by two separate Army reviewing authorities—the Staff Judge Advocate of the Eighth Fighter Command (R. 59-73) and Board of Review No. 1, Branch Office, Judge Advocate General, European Theater of Operations (R. 42-58)—both of which found the record legally sufficient to support the findings and sentence. The findings and sentence were

custody (R. 287) on the ground that AW 70 had not been substantially complied with in that the pretrial investigation provided for by that Article had not been thorough and impartial (R. 277-281, 284). The majority also held—necessarily, in view of their decision declaring the court-martial sentence void—that compliance with AW 70 is a jurisdictional prerequisite to a valid trial by general court-martial (R. 281-284). The dissenting judge assumed, *arguendo*, that compliance with AW 70 is such a jurisdictional prerequisite (though he was of the view that "the proposition is open to grave doubt" (R. 284-285)), but expressed the conviction that the District Court's finding of fact that there had been compliance with AW 70 in this case was fully justified and that the majority's reasons for rejecting the District Court's finding in this respect were "inadequate" (R. 285-287).

The relevant facts may be summarized as follows:

Late in the evening of July 11, 1944, an American soldier assaulted and attempted to commit rape upon an English girl named Miriam Cullum as she was returning to her home on a lonely roadside in England. He abandoned the attempt and fled, however, when two passers-by approached. Shortly before the attack, the soldier had accosted Miss Cullum and a companion, Mrs. Kerry, as they were wheeling their bicycles along the road, and had

where he interviewed and took a statement from her mother, Mrs. Ellen Dale (R. 94-95).

On the following day, July 13, 1944, at the request of an officer of a military police company of the United States Army, to whose attention the rape of Miss Dale had been brought, the Criminal Investigation Division of the United States Army also commenced an investigation of the crime, and two agents of the Criminal Investigation Division (hereafter referred to as the C. I. D.) were assigned to the case (R. 79). These agents, on the same day, "contacted the [British] civil police at Mistley, Essex," and, accompanied by constables Felton and Chaplin, visited the scene of the rape and interviewed the owner of a nearby public house (R. 81). The C. I. D. agents and the British constables then went to the place of employment of Sheila Dale's sister Pamela, who had been with Sheila shortly before the attack upon the latter and had arrived home a little before her (R. 93-94, 119-120, 127), and Felton interviewed and took a statement from Pamela (R. 81, 93-94). In the afternoon of the same day, July 13, Felton interviewed and took a statement from a young girl named Betty Goodall, who had been at the Marsh Cottage on the night of the attack on Miss Dale and had heard two screams from nearby (R. 96). Later on the same day, the C. I. D. agents went to Sheila Dale's home, interviewed her, and made arrangements "to have her keep an appointment

[which she had] made with an unknown American soldier at Brantham, Suffolk" (R. 81).[4] The agents, accompanied by constables Felton and Chaplin, went to the agreed upon trysting place in Brantham later that day and "observed the place of appointment but no American soldier kept the appointment" (R. 81).

Three days later, on July 16, 1944, the unsuccessful rape attempt on Miss Cullum (see pp. 8-9, *supra*) came to the attention of the British police (R. 197). On the following day, July 17, constable Felton interviewed and took a statement from Miss Cullum (R. 97, 192; R. 258-260, 90[5]), and later the same day he interviewed and took a statement from one Welham (R. 90), who was one of the two passers-by whose approach caused Miss Cullum's assailant to abandon his attempt to rape her (R. 168-169, 260; *supra*, p. 8). Felton notified the C. I. D. agents of the Cullum attack on the following day, July 18 (R. 81).

On the same day, July 18, 1944, some time prior to 3:15 p. m., constables Felton and Chaplin "visited the U. S. A. A. F. Aerodrome at Raydon, Suf-

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[4] Miss Dale testified at the court-martial trial, and also stated in her statement to Felton (*supra*, p. 9), that after her assailant had raped her, he "wanted to see me another night," and that she, hoping that "if I said I would he would let me go" and "frightened that he would start everything all over again" if she refused, told him she would meet him "on Thursday night [July 13] at 7 o'clock" at a designated location in the vicinity (R. 126, 92).

[5] See "Stipulation correcting errors in the printed record" (R. 296).

on the day after that, July 20, Lieutenant Todd was designated to investigate the charges in accordance with the 70th Article of War (R. 99).

Lieutenant Todd conducted the AW 70 investigation on July 21, 22, and 23, 1944 (R. 85, 86, 88, 97), and on July 24th (R. 83, 99), he submitted his "Pretrial Investigating Officer's Report" (R. 83-100), in which he recommended trial by general court-martial (R. 84). In this report, Todd stated (R. 83-84):

> 1. I have investigated the inclosed charges dated 19 July 1944 against Bernard W. Smith, 32286877, Pvt. Hq. Det., 353rd Fighter Group, APO 637, U. S. Army in accordance with the provisions of Article of War 70 and paragraph 35a, Manual for Courts-Martial. At the outset of the investigations, I informed the accused of the nature of the charges alleged against him; of the names of the accuser and witnesses, so far as known to me; of the fact that the charges were about to be investigated; of his right to cross-examine all available witnesses against him and to present anything he may desire in his own behalf, either in defense or mitigation; of his right to have the investigating officer examine available witnesses requested by him; and that it was not necessary for him to make any statement with reference to the charges against him, but that if he did make one it might be used against him.
>
> 2. In the presence of the accused, I have examined the following-named witnesses and

documentary evidence and have reduced the material testimony given by each witness under direct and cross examination, to a statement embodying the substance of the testimony taken on both sides, which said statement is attached hereto as hereinafter indicated:

For the Accused: As shown on Exhibit A.

The following two witnesses against the accused were examined by me in his presence and he was allowed to examine and cross-examine them with my assistance: Miriam Florence Cullum and Sheila Winifred Dale. Their testimony substantiated their statements shown on Exhibit B, with additional matter as shown on Exhibit C.

3. The substance of the expected testimony of the following-named witnesses in written form was made known to the accused who stated he did not desire to cross-examine such witnesses and therefore the same were not called or examined in the presence of the accused.

Frank Albert Welham, Pamela Joy Dale, Mrs. Ellen May Dale, Frederick Harry Eli Beckett, Betty Goodall, Wilfred John Felton. Statements of these witnesses are included in Exhibit B.

4. The following documents have been examined, shown to the accused, and are appended:

Exhibits A, B, and C.

mentary), as they appeared in Exhibit B to Todd's report (R. 90),[11] as well as beneath each of the statements of the five other English civilian witnesses to Felton appearing in that exhibit (R. 90, 94, 95, 96). Felton's own statement (*supra*, p. 17), as it appeared in Todd's exhibit B (R. 97), was similarly indicated to be a "true copy" certified by Detective Sergeant Shepherd[12] and re-certified by Todd.

On August 9, 1944, sixteen days (cf. p. 14, *supra*) after Lieutenant Todd's submission of his "Pretrial Investigating Officer's Report" recommending respondent's trial by general court-martial, a general court-martial was appointed to meet on August 10, 1944, "or as soon thereafter as practicable" (R. 110-111). The "Detail for the Court" included Lieutenant Todd as assistant trial judge advocate, *i.e.*, assistant prosecutor (R. 111). The trial (R. 109-251) took place on August 25 and 26, 1944 (R. 104).

At the habeas corpus hearing (R. 9-37), Lieutenant (then Captain) Todd took the stand and told of the two British constables coming to his office on July 18, 1944; their telling him about the attacks on the two English girls (this being his first knowledge of the matter); his summoning of soldiers at the constables' request, for question-

[11] See "Stipulation correcting errors in the printed record" (R. 296).

[12] Shepherd was evidently another British police officer.

ing; and his subsequent[13] conduct of the line-up in which respondent appeared and was identified by the girls as their assailant (R. 31-33). Todd testified that respondent stated to him, in the presence of respondent's commanding officer, Captain MacGregor, that he had no objection to appearing in the line-up (R. 32, 33). Todd also testified that, to insure fairness in the conduct of the line-up and "to protect [respondent's] rights," "the Chaplain of the Field, the Executive Officer of the Field, and several others," in addition to respondent's commanding officer, were present at the line-up as witnesses (R. 32). The English girls identified respondent separately, Todd testified, and there "seemed to be no hesitation in their identification" (R. 33). Todd also stated that he subsequently

[13] Todd testified that he was "certain" that he conducted this line-up some time after he had been appointed as the AW 70 investigating officer, and that his "best judgment" was that the line-up occurred "approximately a week" after the interrogation of respondent by the constables and Todd in the latter's office (R. 36; *see* also R. 32). It is clear from the court-martial record, however, that Todd was mistaken in these respects. The record indicates that the line-up was conducted on the evening of July 18, 1944, the same day that respondent was interviewed in Todd's office, and two days before Todd's appointment as the AW 70 investigating officer (*supra*, pp. 11, 12, 13-14). Todd's mistake in these respects may have been due to his confusion as to the date of his initial interview with respondent (July 18) (see R. 31, 32, 36). The record of the habeas corpus hearing indicates that Todd's confusion in respect of dates would have been promptly cleared up if he could have been advised as to "the exact date" of his appointment as the AW 70 investigating officer (which date he could not independently recall), but the matter was not cleared up because it was thought that the court-martial record did not indicate the date of his appointment (R. 36).

"asked Smith if he thought the line-up was conducted in a fair manner and he said it was," though "he still protested his innocence" (R. 33).

Todd further testified that when he was appointed as the AW 70 investigating officer he "was perfectly of a fair mind" and only "wanted to get at the truth of the matter" (R. 33). At the start of the investigation, he testified, he advised respondent that he could make a statement or not, as he chose, and that he could be present at the interrogation of all witnesses and examine them himself. Respondent did in fact accompany Todd whenever the latter went to question witnesses, Todd stated, and was given full opportunity to, and did, cross-examine them. Todd further testified that respondent requested him to call certain witnesses in his own behalf to substantiate his defense of alibi. Todd did call and question such witnesses, he said, and permitted respondent to question them. (R. 34.)

Todd further testified that he did not interrogate Mrs. Kerry [14] in the course of the AW 70 investigation because (R. 35)—

> So far as from a prosecution standpoint it was not necessary. As far as from the Defense standpoint, I asked Smith if he wanted her and he said "No."

[14] Mrs. Kerry, it will be recalled (see pp. 8-9, *supra*), was the woman who had been in the company of Miss Cullum when they were first accosted by Miss Cullum's assailant, shortly before his attack on her.

Respondent, who preceded Todd as a witness at the habeas corpus hearing, had testified (R. 20) that in the course of the AW 70 investigation, following Todd's interrogation, in his presence, of the two girl victims, Todd—

> * * * asked me if I was satisfied about talking to these girls. He was rather fair and so he said you have one other witness here a Mrs. Kerry, she lives in Brantham. He asked me if I wanted to see her. I didn't know exactly whether I did or not. I said I would let him know. He said "You said this Mrs. Kerry cannot identify you, she has never seen you; so if you go there and talk to this woman she will know what you look like so my advice to you would be to wait until it comes up, and if she can't identify you it will be a point for you."

Todd denied having given any such advice as that attributed to him by respondent. "No such conversation took place," he stated (R. 35).

SUMMARY OF ARGUMENT

In ordering the respondent discharged from confinement under the sentence of an Army court-martial, the Court of Appeals held (1) that the pre-trial investigation of the charges against respondent did not comply substantially with AW 70 in that such investigation was neither thorough nor impartial, and (2) that the proceedings of the court-martial were therefore a nullity for lack of

jurisdiction, i.e., that compliance with AW 70 is a jurisdictional prerequisite to the validity of subsequent court-martial proceedings. Under any construction of AW 70, it is clear that only substantial (as opposed to literal and technical) compliance is required, not only by reason of the preliminary nature of the pre-trial investigation but also because of the harmless error rule contained in AW 37. We contend that the pre-trial investigation in this case complied fully with AW 70 and that, in any event, compliance with AW 70 is not a jurisdictional prerequisite to valid trial and conviction by an Army court martial.

I

The pre-trial investigation conducted by Lieutenant Todd complied with AW 70. He fully advised respondent as to all of his rights at this investigation, and respondent in fact took full advantage of all such rights. Todd testified at the habeas corpus hearing that he undertook the investigation with an unbiased mind, and the District Court accepted his testimony as true. The Court of Appeals' reasons for finding that the investigation lacked thoroughness and impartiality—namely, Todd's failure to question the witness Mrs. Kerry, his subsequent appointment as assistant trial judge advocate at the trial, and the fact that he participated in the preliminary investigation which preceded the AW 70 investigation—are insubstantial.

A. Todd's failure to question Mrs. Kerry during the pre-trial investigation showed no lack of impartiality since, as the District Court found, respondent had affirmatively indicated to him that he did not desire Mrs. Kerry to be interrogated. Neither did the failure to question Mrs. Kerry indicate lack of thoroughness on Todd's part. For it was not necessary that Todd call this witness in view of the positiveness of both victims' identification of respondent as their assailant. Todd was conducting a *pre-trial* investigation of charges; he was not finally determining respondent's guilt or innocence. His investigation was sufficiently "thorough" when he became convinced that, regardless of what else he might uncover by further investigation, he had no alternative to recommending a general court-martial trial. No matter what Mrs. Kerry might have said to him—even if she were able positively to state that respondent was not the man who accosted her and Miss Cullum shortly before the attack on the latter—Todd still would have had to recommend trial in view of the evidence already in his possession. A "thorough" investigation, therefore, did not require him to question Mrs. Kerry even against respondent's wishes.

B. Todd's subsequent designation, sixteen days after completion of his AW 70 investigation, as assistant trial judge advocate at the court-martial trial, obviously cannot be construed as reflecting

either on the thoroughness or the impartiality of his conduct of that investigation.

C. Todd's brief and routine role in the preliminary investigation, which preceded the filing of the charges which he later investigated pursuant to AW 70, did not preclude him from entering upon his duties as the AW 70 investigating officer free of bias, as he testified he did. His participation in the preliminary investigation was strictly limited and incidental. It consisted, in essence, of routine cooperation, in his capacity as Provost Marshal of respondent's station, with the British police and the agents of our Army's Criminal Investigation Division, who were the true preliminary investigators. Todd's cooperation, moreover, was limited to the final few hours of a week-long investigation conducted by those other officials. He had not even heard of the incidents under investigation prior to that time. His cooperation consisted of summoning suspect soldiers at the request of the British police, joining with the police in questioning them, and conducting an identification line-up, at which respondent was identified by the girl victims as their assailant. That was the full extent of his participation in the preliminary investigation. All that he did could have been done just as properly in the capacity of an AW 70 investigating officer, and the fact that he did the same things immediately prior to his appointment as such

clearly did not deprive the respondent of the benefits of AW 70.

The majority were mistaken in supposing that he interrogated the girls prior to his appointment as AW 70 investigating officer. He clearly was not "the real accuser". He did not prefer the charges. He was not harmed by respondent's crimes. And it was not he, but the girl victims, who identified respondent at the line-up.

The purpose of the pre-trial investigation prescribed by AW 70 is to prevent the trial of flimsy and groundless charges and to dispose of minor offenses otherwise than by trial by a general court-martial. In this case, these purposes were satisfied when the pre-trial investigator had informed himself that there was substantial evidence that respondent had committed a serious crime, notwithstanding a significant conflict in the evidence. At that point, it was clear that referring the case for trial by general court-martial would present to such a tribunal matters which were neither flimsy nor minor. It was then obvious that every consideration of justice to respondent and the maintenance of discipline in a friendly foreign country required the ascertainment of the facts by a tribunal with appropriate powers. The purposes of AW 70 were satisfied.

II

In any event, failure to comply with AW 70 is not a jurisdictional defect vitiating the entire court-

martial proceeding. The respondent, a person subject to military law, was tried by a properly constituted court-martial for offenses against military law. Nothing in the nature and purposes of AW 70, nor in its history prior and subsequent to its enactment in 1920, suggests that Congress intended compliance with AW 70 to constitute a jurisdictional limitation on Army courts-martial. In fact, all of the evidence is to the contrary.

The purpose of AW 70 is to prevent the trial of groundless charges or minor offenses by a general court-martial. The result is dual: to save the accused from the opprobrium and inconvenience of unwarranted trial, and to save the Army the expense and inconvenience of unnecessary general courts-martial. However, by its very nature, the AW 70 investigation is preliminary and nondecisive. The investigating officer can only recommend trial by a general court-martial; the decision to try the charges before such a court can be made only by the higher commander. And, of course, the ultimate determination of guilt or innocence is by the court-martial, subject to review by higher authority.

The fact that the AW 70 investigation differs from the *ex parte* accusatory procedures of civil law in that under AW 70 the accused participates to an extent generally unknown to grand jury proceedings, does not alter the tentative character of the investigation. To the contrary, while a grand jury may refuse to indict, the AW 70 investigating officer can

only recommend that the charges be disposed of otherwise than by a trial by a general court-martial. The advisory and informal nature of the AW 70 investigation is further emphasized by the fact that the investigating officer, unlike the grand jury and the court-martial, has no subpoena power, and the accused until 1949 was not entitled to counsel at this stage. Nevertheless, by analogy, the non-jurisdictional nature of defects in grand jury procedure strongly suggests that compliance with AW 70 does not condition the jurisdiction of an Army court-martial. This conclusion is further compelled by the fact that Congress has never inserted in the Articles for the Government of the Navy any requirement equivalent to AW 70.

The legislative history of AW 70, both prior and subsequent to its enactment in 1920, conclusively demonstrates that Congress never intended compliance with AW 70 to condition the jurisdiction of a court-martial. AW 70 was a codification and expansion of the earlier Army policy of requiring a pre-trial investigation of charges. Nothing in the legislative history of the 1920 enactment suggests a Congressional purpose to create an additional jurisdictional limitation. After one early decision that complete non-compliance with AW 70 was jurisdictional, the Judge Advocate General has consistently interpreted it as non-jurisdictional. In 1946, the House Committee on Military Affairs recommended that AW 70 be amended so as to provide that failure to comply with its provisions

should be jurisdictional error, thus indicating its understanding that in its present form AW 70 is not a jurisdictional limitation. Most significant of all, in 1948, when the Articles of War were extensively revised, Congress, after being specifically informed of the Army's interpretation of AW 70 as non-jurisdictional in nature, reenacted that provision without pertinent change. It is clear, therefore, that Congress has never intended compliance with AW 70 to be a condition precedent to the jurisdiction of an Army general court-martial.

ARGUMENT

In this case, a soldier concededly subject to military law was convicted by a lawfully constituted general court-martial, after a fair trial, of two offenses against the Articles of War, one of which is one of the most serious offenses known to the law; the sentence was approved and confirmed after the record of trial had been painstakingly and exhaustively reviewed (see R. 42-58, 59-73) by the agencies provided by law for that purpose; but, notwithstanding such facts, the conviction has been set aside years later and the convicted person ordered freed, beyond practical possibility of re-trial, because of alleged errors which occurred in the hinterland of the proceedings—alleged procedural irregularities which took place prior to, and had nothing to do with, the actual trial. In the words of Judge Learned Hand in an analogous case (*United States ex rel. McCann* v. *Thompson*, 144 F. 2d 604, 608

(C.A. 2), certiorari denied, 323 U. S. 790), the result achieved by the court below—

> would grant immunity to the relator for a crime, of which, as the record now stands, he has been lawfully convicted; an immunity based in no sense upon the merits of the trial, but only upon the irregularities in the accusation. *Nothing could more effectively defeat the interests of justice.* [Italics added.]

The Court of Appeals held (1) that the pre-trial investigation of the charges in this case was not thorough or impartial, in consequence of which the requirements of the second paragraph of AW 70, *supra*, pp. 3-4, were not substantially satisfied, and (2) that, by reason of such noncompliance, the court-martial trial was an absolute nullity for lack of jurisdiction. If the court was wrong in either respect, its decision is unsupportable. We submit that it was wrong in both respects.

Under Point I, *infra*, pp. 30-49, we shall assume, *arguendo*, that compliance with AW 70 is a jurisdictional prerequisite to a valid court-martial trial, and will argue that AW 70 was complied with in this case. It is clear that at the most only substantial compliance with AW 70 is required, since Congress has provided in AW 37 (10 U.S.C., 1946 ed., 1508) that "The proceedings of a court martial shall not be held invalid * * * as to any matter of pleading or procedure unless in the opinion of the

reviewing or confirming authority, after an examination of the entire proceedings, it shall appear that the error complained of has injuriously affected the substantial rights of an accused * * *."[15] This is the fundamental standard of review in the military, as evidenced by the process of review in this case (R. 42, 71). Under Point II, *infra*, pp. 59-81, we shall contend that, in any event, compliance with AW 70 is not such a jurisdictional condition precedent.

I

The Requirements of AW 70 Were Satisfied in This Case

It is undisputed that Lieutenant Todd, the AW 70 investigating officer, fully advised respondent at the outset of the investigation "of the nature of the charges alleged against him," "of the names of the accuser and witnesses, so far as known," and "of the fact that the charges were about to be investigated". It is likewise undisputed that Todd fully advised respondent "of his right to cross-examine all available witnesses against him and to present anything he may desire in his own behalf, either in defense or mitigation," "of his right to have the investigating officer examine available witnesses requested by him," and of the fact that "it was not necessary for him to make any statement

[15] That this "harmless error" rule is to be applied broadly is emphasized by the proviso "That the act or omission upon which the accused has been tried constitutes an offense denounced and made punishable by one or more of these articles."

with reference to the charges against him, but that if he did make one it might be used against him." (*Supra*, p. 14.) In these respects Todd fully complied with the provisions of AW 70, *supra*, pp. 3-4, and the "Instructions" to pre-trial investigating officers, as contained in the *Manual for Courts-Martial*, 1928 ed., § 35*a*.[16] Todd testified, moreover—and the District Court accepted his testimony as true (see R. 271, and fn. 30 thereto)—that he entered upon his duties as investigating officer with a "perfectly * * * fair mind," desiring only "to get at the truth of the matter" (*supra*, p. 20).

Despite all these facts, however, the majority below held that Todd's investigation was not "thorough and impartial," as required by AW 70, for the following three reasons: (a) Todd failed, in his capacity as AW 70 investigating officer, to call and interrogate Mrs. Kerry (R. 280); (b) Todd subsequently was named assistant trial judge advocate at the court-martial trial (R. 281); and (c) Todd took part in the preliminary investigation, *i.e.*, the investigation which preceded the filing of the formal charges which he subsequently investigated pursuant to AW 70 (R. 278-280). We submit that none

[16] The "Instructions" contained in § 35*a* of the 1949 edition of the *Manual for Courts-Martial* are substantially identical, except that the 1949 edition also requires the investigating officer to inform the accused of his right to counsel at the investigation, in accordance with the revision that became effective February 1, 1949 (see footnote 2, *supra*, pp. 2-3).

of these reasons warrants the conclusion reached that the provisions of AW 70 were not complied with because of a lack of thoroughness and impartiality in Todd's conduct of the pre-trial investigation. And even if it be thought that there had been any departure from the requirements of AW 70, the departure was neither substantial nor prejudicial.

A. *Todd's failure, in his capacity as AW 70 investigating officer, to call and interrogate Mrs. Kerry showed a lack neither of impartiality nor of thoroughness.* 1. The failure manifestly did not show lack of impartiality on Todd's part since, according to Todd's testimony at the habeas corpus hearing (*supra*, pp. 20-21), which the district judge accepted as true (*supra*, p. 31), respondent affirmatively indicated to him that he did not desire this witness to be interrogated. We deem it unnecessary to dwell further on the "impartiality" aspect of the failure to call Mrs. Kerry, for, as we read the opinion below, the majority's criticism of Todd's failure to interrogate this witness is based on their belief that Todd's failure indicated lack of thoroughness in his conduct of the investigation rather than lack of impartiality.

2. Neither can Todd's failure to interrogate Mrs. Kerry reasonably be deemed to evidence lack of thoroughness on his part in the conduct of the pre-trial investigation. According to respondent's testimony, he was at first undecided as to whether to call Mrs. Kerry as a witness, but finally decided,

at Todd's suggestion, to forego calling her (*supra*, p. 21). Todd, however, denied making any such suggestion, and stated that he refrained from summoning this particular witness for the twofold reason that her testimony was unnecessary "from a prosecution standpoint," and that respondent affirmatively indicated to him that he did not desire this witness to be called on his behalf (*supra*, pp. 20-21). And the district judge stated in his opinion that "After hearing and seeing the witnesses this Court would accept Lt. Todd's testimony on this matter" (R. 271, fn. 30; cf. R. 274, and fn. 50 thereto). More important, what the majority below seem to have overlooked is the fact that what Todd was conducting was a *pre-trial* investigation of charges. He was not finally determining respondent's guilt or innocence. He was not required to convince himself beyond a reasonable doubt of respondent's guilt in order to recommend that he be brought to trial. It would be the function of the court-martial to hear all available evidence both sides had to offer and on the basis of such evidence to adjudge respondent guilty or innocent.

Todd knew that both of the English girls had positively, unhesitatingly, and independently of each other, identified respondent as their attacker. What purpose, from a *pre-trial* investigator's point of view, would have been served by questioning Mrs. Kerry under the circumstances? If she, too,

identified respondent as the soldier who accosted her and Miss Cullum before the attack on the latter, her testimony would merely have corroborated the victims'. If she was unable to identify him, her testimony would have been merely negative in character, and hence could have had no influence one way or the other on Todd's decision to recommend trial. And even if it be assumed that she could and would have positively stated that the man who accosted her and Miss Cullum was not respondent—the hypothesis most favorable from his standpoint—such testimony would clearly not have justified Todd in failing to recommend a court-martial trial. For on that assumption, while Mrs. Kerry's testimony would of course have cast doubt upon the victims' identification of respondent, it is plain that it could have done no more than that. Todd would still have been required, in view of the two victims' positive identification of respondent, to recommend that he be brought to trial, where the issue created by the conflicting testimony could be resolved by the tribunal created for that purpose, the court-martial.[17]

We submit that the dissenting judge was clearly correct in saying that "there is no basis for requir-

[17] It should be noted that any testimony Mrs. Kerry might have given would have related only to the identification of the person who assaulted Miss Cullum. Thus, there is no complaint as to the thoroughness of the pre-trial investigation of the charge of raping Miss Dale. The latter charge alone would support respondent's sentence. *Kelly* v. *Pescor*, 156 F. 2d 632 (C.A. 8), certiorari denied, 329 U.S. 790.

ing that an investigation, in order to be thorough and impartial, seek out every person mentioned in connection with the affair under scrutiny * * *" (R. 286). For there is nothing in AW 70 which requires the pre-trial investigating officer to examine *all* available witnesses. He must, it is true, examine all available witnesses *requested by the accused*. And he also must afford the accused full opportunity to cross-examine all available witnesses against him if he desires to do so. But, apart from those requirements, the investigation is sufficiently "thorough" within the meaning of AW 70 when the investigating officer has convinced himself, from the witnesses and evidence he has examined, that a general court-martial trial is called for, and that nothing further which he might uncover could reasonably justify him in failing to recommend such a trial.

That this is the proper interpretation of the "thoroughness" requirement of AW 70 is clearly indicated by § 35*a* of *Manual for Courts-Martial*, 1928 ed. "The [AW 70] investigation," it is there stated, "should be prompt, dignified, and military. It should also be as brief as is consistent with thoroughness and fairness, and should, therefore, not include any examination or cross-examination into matters *not essential to determine the necessity of trial*" [italics added]. And later in the same section it is stated that "All available wit-

nesses *who appear to be reasonably necessary* for a thorough and impartial investigation will be called and examined in the presence of the accused" [italics added].[18] The *Manual for Courts-Martial* was promulgated by the President "for the government of all concerned" and was directed to have full "force and effect in the Armies of the United States on and after April 1, 1928" (*id.*, p. IX). And the President's promulgation of the rules, regulations, and instructions contained in the *Manual for Courts-Martial* is expressly authorized by AW 38 (10 U.S.C., 1946 ed., 1509).[19] Consequently, the above-quoted instructions of the *Manual for Courts-Martial,* embodying as they do an interpretation of AW 70 by the President and Commander in Chief—an interpretation that is clearly reasonable, as we have shown—are entitled to great weight in the judicial construction of the "thoroughness" provision of that Article. *Fleming* v. *Mohawk Co.*, 331 U. S. 111, 116; *Boutell* v.

[18] The substance of the quoted provisions is repeated in § 35*a* of the 1949 edition of the *Manual for Courts-Martial.*

[19] "The President may, by regulations, which he may modify from time to time, prescribe the procedure, including modes of proof, in cases before courts-martial, courts of inquiry, military commissions, and other military tribunals * * *: *Provided*, That nothing contrary to or inconsistent with these articles shall be so prescribed: * * *." See also 10 U.S.C., 1946 ed., 16: "The President is authorized to make and publish regulations for the government of the Army in accordance with existing laws, which shall be in force and obeyed until altered or revoked by the same authority: *Provided*, That said regulations shall not be inconsistent with the laws of the United States." Compare, in respect of Navy "orders, regulations, and instructions," 34 U.S.C. 591.

Walling, 327 U. S. 463, 470-471; *Billings v. Truesdell*, 321 U. S. 542, 552-553; *Federal Trade Commission v. Bunte Bros.*, 312 U. S. 349, 351-352; *United States v. American Trucking Ass'ns*, 310 U. S. 534, 549.

B. *The fact that Todd was subsequently detailed as assistant trial judge advocate at the court-martial trial, which, as AW 70 investigating officer, he had recommended, can in no way be construed to indicate partiality in his earlier conduct of the AW 70 investigation.*—Lieutenant Todd was appointed as the AW 70 investigating officer on July 20, 1944. He conducted the investigation during the next three days, and on July 24th he submitted his "Pretrial Investigating Officer's Report," recommending that respondent be tried by general court-martial. (*Supra*, p. 14.) *Sixteen days thereafter*, on August 9th, the court-martial was appointed, and Lieutenant Todd was named as assistant trial judge advocate at the trial, which took place a few weeks later, on August 25th and 26th (*supra*, p. 18).

It is thus clear that when Todd was appointed assistant trial judge advocate at the court-martial trial, his work as pre-trial investigating officer had long since been completed and his report filed. With the dissenting judge (R. 286), therefore, we simply cannot comprehend how Todd's subsequent appointment as assistant trial judge advocate can in any way be construed to support the majority's

conclusion that Todd did not conduct a thorough and impartial pre-trial investigation.[20]

If Todd knew, or even had grounds to believe, at the time he conducted the AW 70 investigation, that he would be a member of the prosecutor's staff in the event that he recommended trial by general court-martial and his recommendation was followed, there might conceivably be some justification for the view that his AW 70 investigation was not, or possibly might not have been, conducted with the degree of impartiality required by that Article. But there is absolutely nothing in the record to indicate that Todd had any such knowledge, or grounds for such a belief, at the time of the AW 70

[20] Indeed, it would seem that the majority judges themselves, at least implicitly, recognized the illogic of the view that Todd's appointment as assistant prosecutor could be construed to reflect on the impartiality of his prior conduct of the AW 70 investigation. "The transcript does not reveal [Todd] as actually examining [at the trial]," the majority stated, "but with the case prepared by him from the beginning it is reasonable to assume that he was of considerable pre-trial and trial assistance to the trial judge advocate" (R. 281). If we correctly understand this observation of the majority, their point was that Todd, by virtue of his acquaintance with the facts in the case, acquired as a result of his having conducted the AW 70 investigation, was in a position to be particularly helpful to the trial judge advocate in preparing for the trial and at the trial itself. This was undoubtedly true. But that fact still does not meet our contention, and that of the dissenting judge, that Todd's appointment as assistant trial judge advocate—whether he was particularly helpful in that capacity or only ordinarily so—cannot be related back to the time when he conducted the AW 70 investigation, so as to evidence lack of impartiality or thoroughness in the conduct of that investigation. And it was solely upon their belief that AW 70 was not substantially complied with in this case, it must be remembered, that the majority based their conclusion that the court-martial lacked jurisdiction (R. 281-284).

investigation. The record, indeed, quite clearly indicates the contrary, since it contains Todd's testimony at the habeas corpus hearing, which the district judge believed (*supra*, p. 31), that when he conducted the AW 70 investigation he "was perfectly of a fair mind" and only "wanted to get at the truth of the matter" (*supra*, p. 20). In any event, the majority below did not purport to base their conclusion that Todd was partial in his conduct of the AW 70 investigation on any supposed knowledge or belief on Todd's part that he might subsequently participate at the trial on the prosecutor's staff.

Benjamin v. *Hunter*, 169 F. 2d 512, 514 (C.A. 10), presented a factual situation on all fours with the instant case in respect of the point now under discussion. In that case, two days after the AW 70 investigating officer had completed his investigation and submitted his report recommending trial by court-martial, the court-martial was appointed and the officer who had made the AW 70 investigation was designated as assistant trial judge advocate of the court. The Tenth Circuit held that the fact that the AW 70 investigating officer was later appointed to the prosecutor's staff was in nowise indicative of his having failed to make a thorough and impartial pre-trial investigation. Indeed, the point was scarcely discussed by the court in the *Benjamin* case. The fact in that case to which the court

gave principal attention, but notwithstanding which it held AW 70 to have been substantially complied with, was the fact—not present in the case at bar—that the AW 70 investigating officer, several weeks before he was named as such, had been appointed assistant trial judge advocate of another court-martial, which had been appointed, not for the trial of any specific case, but generally "for the trial of such persons as might be brought before it." The record in the *Benjamin* case did not disclose whether the officer in question was still assistant trial judge advocate of this earlier-appointed court, or indeed whether that court was still in existence, at the time of his appointment as AW 70 investigating officer in *Benjamin's* case. But the Tenth Circuit held that, regardless of what the situation may have been in those two respects, it had no bearing on the question of whether the AW 70 investigation of the charges against Benjamin was thorough and impartial, for the reason that the earlier-appointed court-martial "did not have anything to do with the charges against [Benjamin]."[21]

[21] At the time of respondent's court-martial trial, AW 11 (10 U.S.C., 1946 ed., 1482) provided for the appointment, for a general court-martial trial, of a trial judge advocate and a defense counsel, and, when necessary, of one or more assistants to each. The AW 70 investigating officer was not disqualified by AW 11, as it stood at that time, from being subsequently appointed to either the prosecution or the defense staff. Effective February 1, 1949, AW 11 has been amended so as to prohibit a "member [of the court-martial], trial judge advocate, assistant trial judge advocate *or investigating officer* in any case" from subsequently acting "in the same case as defense counsel or assistant defense counsel unless expressly

C. The fact that Todd participated briefly in the preliminary investigation and conducted the line-up which resulted in respondent's identification as the victims' attacker did not preclude him from thereafter conducting a thorough and impartial pre-trial investigation.—The third ground relied on by the majority below as showing lack of impartiality and thoroughness on Todd's part during the pre-trial investigation—namely, that he participated to some extent in the preliminary investigation preceding the filing of the formal charges which he later investigated as AW 70 investigating officer (R. 278-280)—is equally unsubstantial.

Todd's participation in the preliminary investigation was strictly limited and incidental. It consisted, in essence, of routine cooperation, in his

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requested by the accused," and likewise to prohibit a "member, defense counsel, assistant defense counsel, *or investigating officer* in any case" from subsequently acting "in the same case as a member of the prosecution" [italics supplied]. See Act of June 24, 1948, c. 625 (Public Law 759, 80th Cong.), Title II, §§ 208, 244. Thus, under the law as it now stands, the pre-trial investigating officer may not subsequently be detailed either to defend the accused (except at the latter's request) or to assist in his prosecution. But, as we have stated, no such prohibition was in effect at the time of respondent's trial. Whatever may have been the reasons or policy considerations underlying the recent amendment of AW 11, it is clear that all that the amendment was designed to accomplish was to disqualify the pre-trial investigating officer (and the other officers mentioned) from subsequently acting in the capacities specified. But the amendment of AW 11 in nowise refutes our contention that the majority opinion below—attributing partiality to the pre-trial investigation by virtue of the fact that the officer who conducted it was subsequently named to the prosecution staff—is to that extent logically infirm.

capacity as Provost Marshal of the Army base at which respondent was stationed, with the British police and the agents of our Army's Criminal Investigation Division, who were the true preliminary investigators of the offenses. Todd's cooperation, moreover, was limited to the final few hours of a week-long investigation. The preliminary investigation had been in progress for a week before Todd ever heard of the incidents that were being investigated. The investigation began on the morning of July 12, 1944, the day following the attacks on the two English girls, when Felton, the British constable in charge of the investigation initiated by the local civilian police, started to interview witnesses in connection with the rape of Miss Dale, took possession of certain material evidence, and visited the scene of the rape (*supra*, p. 9). The C.I.D. agents joined in the investigation on the following day, July 13, the rape of Miss Dale having in the meantime come to the attention of our military authorities (*supra*, p. 10). The C.I.D. agents thereafter worked hand in hand with Felton and the British police, interviewing additional witnesses and otherwise carrying on a routine police investigation (*supra*, pp. 10-11). On the fifth day of the investigation, July 16, the attempted rape of Miss Cullum came to the attention of the British police and thus was brought within the scope of their investigation (*supra*, p. 11). On the following day, July 17, Felton interviewed other wit-

nesses, relative to the Cullum case, and on July 18 notified the C.I.D. agents of this second crime (*supra*, p. 11).

It was on the latter date, July 18—one week to the day after the occurrence of the attacks, and the seventh day of the investigation—that Lieutenant Todd first learned of the matters under investigation (*supra*, pp. 11-12). It was on that day that constables Felton and Chaplin called on Todd, the Provost Marshal of Raydon Aerodrome, informed him of the attacks and the investigation which had been carried on by them and the C.I.D. agents, furnished him with a description of the soldier-assailant as supplied by the girl victims, and asked him to cooperate with them in their investigation by summoning various suspect soldiers for questioning (*supra*, pp. 11-12). Todd summoned suspects as requested and, with the constables, interrogated them (*supra*, p. 12). When the facts known to the British constables seemed to point to the guilt of respondent, who was one of the soldiers interrogated, Todd further cooperated with the constables to the extent of conducting the identification line-up which resulted in the identification of respondent by both of the complaining witnesses. That was the full extent of Todd's participation and assistance in the preliminary investigation.

The record does not support the statement of the majority of the court below that Todd "would seem-

to have interviewed the girls that same evening [*i.e.*, the evening of the lineup]" (R. 278). This conclusion was based upon the fact that Todd certified or authenticated copies of the girls' original and supplementary statements to Constable Felton as being true copies of those statements; and upon the assumption that "Exhibit B for the defense referred to at the trial as 'Statement of Sheila Dale to Lieutenant Todd' appears to be the record of such an interview" (R. 278-279). To the contrary, it is clear from the form of Todd's certification (*supra*, pp. 17-18) that he was merely performing an authentication function. The statements on their face indicate that they were made to Felton before Todd had heard of the case, except for the last paragraph of each relating to the identification lineup. Also, the same form of certification by Todd appears on copies of statements by five other witnesses who were admittedly not interviewed by Todd at any time. As to defense Exhibit B (R. 258-260) it shows on its face that it is simply Miss Cullum's original and supplemental statement to Constable Felton. Thus, there is nothing in the record to show that Todd interviewed either Miss Dale or Miss Cullum prior to his appointment as AW 70 investigator.[22]

[22] As Todd testified at the habeas corpus hearing, his certification was merely his attestation that the statements were "a true copy of something the Dale girl [and the Cullum girl] said to the Constable [Felton]" (R. 36). Todd did not personally interrogate either girl until after he was appointed AW 70 investigating officer. See Todd's statement in his "Pre-

In brief, Todd, as Provost Marshal cooperated briefly and routinely with the preliminary investigators in the last few hours of their week-long investigation. He clearly was not "the real accuser", as stated by the majority of the court below (R. 284). It was not Todd who preferred the formal charges against respondent, but the latter's commanding officer, Captain MacGregor (*supra*, p. 13), who had been present at both the questioning of respondent by the British constables and the identification lineup (R. 14, 15, 16). Obviously it was not Todd who was injured by respondent's alleged crimes.

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trial Investigating Officer's Report" that he examined Miss Dale and Miss Cullum in respondent's presence in the course of the AW 70 investigation, and that "Their testimony substantiated their statements shown on Exhibit B [to Todd's report, consisting of certified copies of the statements of the two girls and the other civilian witnesses to Felton], with additional matter as shown on Exhibit C [to Todd's report]" (*supra*, p. 15).

The majority's statement that "Exhibit B for the defense referred to at the trial as 'Statement of Sheila Dale to Lieutenant Todd' appears to be the record of such an interview" is confusing and misleading. We have been unable to find where in the record "Exhibit B for the defense" was "referred to at the trial as 'Statement of Sheila Dale to Lieutenant Todd'." As a matter of fact, the defense's Exhibit B at the trial consisted of *Miss Cullum's* original and supplementary statements to *Felton* (see R. 258-260; cf. "Stipulation correcting errors in the printed record," R. 296), and the defense's exhibit A at the trial consisted of Miss Dale's original and supplementary statements, also made to Felton (see R. 139, 255-258). It is true that just prior to the reception in evidence of defense exhibit B, defense counsel, referring to this exhibit, said to Miss Cullum, the witness on the stand, "I hand you the statement you made to *Lt. Todd* and ask you to look at it. Is that the statement you made to him?" [italics added], to which Miss Cullum replied, "Yes" (R. 176). This inaccurate answer of Miss Cullum's is explainable, however,

To summarize, it seems that Todd's most significant connection with the pre-charge investigation was that in cooperation with the British police and the C. I. D. agents he conducted the line-up at which respondent was identified as the guilty person. We submit that this in no way precluded him from entering upon his duties subsequently as the AW 70 investigating officer with a fair and unbiased mind (cf. *Henry* v. *Hodges*, 171 F. 2d 401 (C. A. 2), discussed *infra*, pp. 47-49), as he testified he did (*supra*, p. 20). Impartiality means something other than complete ignorance of a matter. "In fact, judges frequently try the same case more than once and decide identical issues each time, although these issues involve questions both of law and fact." *Federal Trade Commission* v. *Cement Institute*, 333 U. S. 683, 703.

In any event, all that is alleged raises only the question of whether Todd was disqualified to act as AW 70 investigating officer because prior to the filing of the charges he had done some of the things that would properly have been part of the AW 70

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by the facts (1) that she was interviewed by and gave a statement to Lieutenant Todd in the course of Todd's AW 70 investigation and (2) that her statement to Todd "substantiated" (as Todd said in his "Pretrial Investigating Officer's Report," *supra*, p. 15) her previous statements to Felton (as contained in Exhibit B to Todd's report). In short, Miss Cullum told her story both to Felton (in the course of Felton's preliminary investigation) and to Todd (in the course of Todd's AW 70 investigation); and since both statements covered substantially the same ground, Miss Cullum evidently did not distinguish between the two in giving the affirmative answer to the question put to her at the trial under the circumstances we have just mentioned.

investigation. Certainly, the statute itself contains no such disqualification of every officer who has had any part in the discovery or investigation of an alleged offense. As the District Judge put it: "Whether Lt. Todd participated [in arranging the line-up] as Provost Marshal prior to or as [AW 70] investigator subsequent to his designation is immaterial. It was a proper part of an impartial investigation" (R. 271). That is to say, it would have been a proper part of Todd's AW 70 investigation to have conducted an identification line-up in which respondent appeared by consent (as he in fact appeared in the line-up actually conducted (*supra* p. 19; R. 210, 216)) if such a line-up had not already been conducted. AW 70 requires an impartial investigation, but does not exclude, as partial or biased, every officer who in the course of his duties, and without any showing of prejudice, has already done some of the things which would normally be a part of the AW 70 investigation.

The decision below, to the extent that it holds that AW 70 was not complied with because of the AW 70 investigating officer's limited participation in the pre-charge investigation which preceded the AW 70 investigation, squarely conflicts with *Henry* v. *Hodges*, 171 F. 2d 401 (C.A. 2), now pending before this Court on petition for certiorari, No. 598,[23] reversing *Henry* v. *Hodges*, 76 F. Supp. 968

[23] In another recent decision of the Second Circuit, *Becker* v. *Webster*, 171 F. 2d 762, 764 (C.A. 2), also pending on petition for certiorari as No. 607, it was held, Circuit Judge

(S.D. N.Y.). In that case,[24] one Captain Meyers was directed by his commanding officer to "make a general precharge survey and investigation" of certain shortages of silver bullion. After making an investigation, Captain Meyers filed a report stating in part that "Capt. Henry appears to be the main figure in the affair." Thereupon the commanding officer preferred formal charges of embezzlement against Henry, and appointed Meyers to conduct the pre-trial investigation of the charges required by AW 70. Meyers thereafter filed his AW 70 investigating officer's report recommending that Henry be tried by a general court martial. The Court of Appeals for the Second Circuit held that there was substantial compliance with AW 70, thereby reversing the contrary decision of the District Court that AW 70 had not been complied with in that the AW 70 in-

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Frank dissenting, that that provision of AW 70 requiring that "At such investigation full opportunity shall be given to the accused to cross-examine witnesses against him if they are available" was satisfied under the following circumstances: The AW 70 investigating officer, after being unsuccessful in eliciting anything of value from a certain witness in his first examination of her in the presence of the accused and his counsel, thereafter, on reexamining her in the absence of the accused and his counsel, elicited important statements incriminating the accused. The investigating officer then offered to show the witness' statement to the accused's counsel and told counsel that, if he wished, he might recall the witness and cross-examine her in the accused's presence, which counsel declined to do on the ground that cross-examination would be useless after the direct had been taken in the accused's absence.

[24] The facts are taken from the District Court's opinion (176 F. Supp., at 970-971) as well as from the opinion of the Court of Appeals (171 F. 2d at 402).

vestigating officer was "in fact the accuser."[25] It is clear from the facts in that case that Henry was in no way prejudiced, for Meyers showed him everything that he proposed to act upon, and gave Henry an opportunity to cross-examine any witness and to make a further statement of his own. While we believe that there was substantial compliance with AW 70 in *Henry* v. *Hodges*, it is nevertheless obvious that in the instant case Todd played a far less significant part in the pre-charge investigation than did Meyers in the pre-charge investigation of Henry. In brief, if *Henry* v. *Hodges* was correctly decided, then it must be concluded *a fortiori* that there was substantial compliance with AW 70 here in so far as Todd's connection with the pre-charge investigation is concerned.

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[25] The Second Circuit's opinion also pointed out that "Henry assented to the 'post-charges' investigation without reserve" in that Meyers, during the AW 70 investigation, showed Henry his preliminary report, containing everything he had acted upon and meant to act upon again, and asked Henry whether he wished to cross-examine any witnesses (to which Henry replied that he did not) and whether he wished to make any further statement of his own (to which Henry also replied in the negative) (171 F. 2d, at 402-403). In view of this "assent" on the part of Henry, the Second Circuit stated that "Moreover, the issue [of whether AW 70 was substantially complied with] is not in the case anyway * * *" (171 F. 2d, at 402). The factor of Henry's "assent" to Meyers' conduct of the AW 70 investigation does not, however, distinguish the *Henry* case from the case at bar. For respondent certainly "assented" to Todd's conduct of the AW 70 investigation quite as much as Henry did to Meyers'. Indeed, whereas in the instant case respondent never raised the question of the propriety of Todd's making the AW investigation until he filed his petition for habeas corpus, long after his court-martial trial and conviction (see pp. 6-7, *supra*), Henry vigorously

II

In Any Event, Failure to Comply With AW 70 Is Not a Jurisdictional Defect Vitiating the Entire Court-Martial Proceedings

What we have said thus far has been on the assumption, *arguendo,* that substantial compliance with AW 70, *supra,* pp. 3-4 (or more precisely, the second paragraph of that Article), is a jurisdictional prerequisite to a valid trial by general court-martial. We submit, however, that, properly construed, compliance with AW 70 is not jurisdictional. Our contention is that, so long as the accused is accorded a fair trial and no fundamental, vitiating injustice has been committed either before or during the trial, a court-martial which is properly constituted has jurisdiction to try one who is subject to military law for offenses against military law, notwithstanding that there may have been procedural irregularities in the preparation, filing, and pre-trial investigation of the charges, and notwithstanding even the fact that the charges may never have been properly investigated prior to trial as directed by AW 70. Otherwise stated, we contend that where the jurisdictional conditions of a valid court-martial trial are otherwise satisfied, the jurisdiction of the court is not prevented from coming into existence by the bare fact that irregularities attended the

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pressed his contention that it was improper for Meyers to conduct the AW 70 investigation at the court-martial trial itself (see 76 F. Supp. at 974-975).

pre-trial handling of the charges; or even by the fact that no AW 70 investigation whatever may have been conducted.

We do not, of course, contend that the provisions of AW 70 may be ignored by the military authorities. Nor do we contend that AW 70 confers no rights on an accused. On the contrary, we readily concede that AW 70 confers definite rights on an accused—rights which he may insist upon before trial and at the trial, and concerning the deprivation of which he may complain, if necessary (see AW 121, 10 U.S.C., 1946 ed., 1593), "through channels, even to the War Department" (CM 323486, *Ruckman*, 72 B. R. 267, 273 (1947); quoted in part *infra*, at pp. 69-70). Nor do we deny that the properly constituted reviewing authorities, within the court-martial framework established by law, may set aside a conviction on direct review thereof, on the ground of erroneous and prejudicial failure to comply substantially with AW 70 (cf. Commentary on Article 32 of the proposed Uniform Code of Military Justice, *infra*, p. 76). See AW 37. All that we urge is that failure to comply, literally or substantially, with the provisions of AW 70, does not (absent a showing of actual prejudice) oust the court-martial of jurisdiction, so as to render the entire proceedings a nullity and subject the judgment to collateral attack on habeas corpus in a civil court. In short, we say, though AW 70 concededly confers rights on the accused, it confers "no rights the deprivation of which affects

the jurisdiction of the court to which charges against him are referred for trial." (CM 323486, *Ruckman, supra*, at 273, quoted in part *infra*, at pp. 69-70).

Before proceeding to discuss the legislative and administrative materials which support our view as to the non-jurisdictional nature of the provisions of AW 70 (*infra*, pp. 54-77), we wish to point out that there is nothing unreasonable or unjust about our interpretation of AW 70.

The pre-trial investigation, as will appear more fully (*infra*, pp. 56, 66-67) has, of course, a very definite purpose, and in fact a dual purpose. One is to preserve accused persons who happen to be innocent from the ordeal and ignominy of a general court-martial trial on charges which are in fact unfounded. The other is to save the Army from the time-consuming and expensive burden of conducting general court-martial trials of innocent persons, whose innocence could easily have been discovered by a thorough and impartial pre-trial investigation of the charges. But if for some reason in a given case the pre-trial investigation is not properly conducted or is even omitted altogether: *and if the accused receives a fair trial*, with prior notice of charges, the right of counsel, confrontation of witnesses, compulsory process for securing the attendance of witnesses in his favor, and all the other procedural safeguards of due process which the concept of a fair trial has traditionally implied; and if after such a fair trial he is found guilty of the

charges; and if, after careful review of the proceedings by the duly-constituted reviewing authorities, it is found that the findings are sustained by the evidence and that no prejudicial error has occurred; how can the accused have been prejudiced by the fact either that there was no pre-trial investigation at all or that the investigation was faultily conducted? The view that a conviction thus obtained can be held for naught on habeas corpus, possibly years later, when the court-martial and witnesses have dispersed, and memories faded, on the sole ground that the charges (of which the accused was found guilty beyond a reasonable doubt after a full and fair trial) were never properly investigated *prior to trial*, elevates purely preliminary procedures to a place beside considerations of substantial justice. If the pre-trial investigation is so indispensable that, without it, a court-martial is without jurisdiction to act, then even if the accused appears before the court and upon advice of counsel enters a formal plea of guilty to the charges, it is within his power thereafter—and, as we have said, possibly years thereafter, when re-trial is out of the question—to have his conviction and sentence annulled, in habeas corpus proceedings and thus escape the penal consequences of his crimes on the purely technical ground that the charges were not thoroughly investigated before trial. See remarks of Assistant Judge Advocate General Hoover, during the subcommittee hearings on H. R. 2575, 80th

Cong., 1st sess., Appendix B, *infra*, at p. 105. But the view that AW 70 is jurisdictional goes that far.

Such a conclusion is, we submit, not lightly to be reached. And it need not be reached—in fact, it cannot be reached—if due regard be paid to all the evidence, including that drawn from the legislative evolution of AW 70, which supports our view as to the proper meaning and interpretation of that Article. To a consideration of such evidence we now pass.

A. *The analogies of civilian criminal law emphasize that the non-decisive character of the AW 70 investigation precludes its construction as a condition precedent to court-martial jurisdiction.*

The pre-trial investigation of charges provided by AW 70 is unique in our law, as will be shown below. Nevertheless, certain analogies in civilian criminal law suggest themselves—specifically, the grand jury and the committing magistrate.

It is well established that a complete failure to comply with the requirement of the Fifth Amendment for indictment by grand jury renders the subsequent conviction invalid (*Ex parte Bain*, 121 U. S. 1) unless the accused expressly waives his right thus to be charged (Rule 7(b), F. R. Crim. P.). On the other hand, mere irregularities in the return of the indictment, such as the unlawful impaneling of the grand jury (*Harlan* v. *McGourin*, 218 U. S. 442, 451), disqualification of grand jurors

to sit (*Kaizo* v. *Henry*, 211 U. S. 146, 149; *Ex parte Harding*, 120 U. S. 782, 784), and the like (cf. *United States ex rel. McCann* v. *Thompson*, 144 F. 2d 604 (C.A. 7), certiorari denied, 323 U. S. 790), do not affect the jurisdiction of the court which tries the accused. See also *Sunal* v. *Large*, 332 U. S. 174, 179, which reaffirms the principle that such defects and irregularities in the grand jury proceedings "do not cross the jurisdictional line". As to the proceedings before the commissioner or committing magistrate (F. R. Crim. P., Rule 5), it is well settled that even where there has been no preliminary hearing at all before a committing magistrate, the error does not go to the jurisdiction of the court which thereafter tries the accused. *Burall* v. *Johnston*, 146 F. 2d 230 (C.A. 9), certiorari denied, 325 U. S. 887; *Clarke* v. *Huff*, 119 F. 2d 204 (C.A. D.C.); *Garrison* v. *Johnston*, 104 F. 2d 128, 130 (C.A. 9), certiorari denied, 308 U. S. 553; cf. *Goldsby* v. *United States*, 160 U. S. 70, 73.

The functions of the AW 70 investigating officer are clearly less significant than those of the grand jury and probably less important than those of the committing magistrate. The investigating officer, unlike the grand jury, does not make the accusation; he merely investigates it after some one else has made it.[26] The crucial distinction lies in the

[26] Any person "subject to military law" may prefer charges; he must sign the charges and specifications and state "under oath either that he has personal knowledge of, or has investi-

decisive power of the grand jury—if it refuses to indict that is the end of the matter. In contrast, the AW 70 investigation can only result in a recommendation which is in no way binding upon the investigating officer's superiors.[27] Nor is the investigating officer essentially comparable to the committing magistrate. For, while the procedures to be followed by the investigating officer and the commissioner or committing magistrate are in some

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gated, the matters set forth therein, and that the same are true in fact, to the best of his knowledge and belief" (AW 70, 1st paragraph, *supra*, p. 3).

[27] Where the investigating officer has recommended trial by general court-martial, the appointing or convening authority has several options. He may decide that "all or some of the charges do not warrant further action because they are trivial, do not state offenses, are unsupported by available evidence, or because there are other sound reasons for not punishing the accused with respect to the acts alleged. If so, he may dismiss all or part of the charges" (MCM, 1949 ed., § 34*b*). Or he may "act under Article 104 [10 U.S.C., 1946 ed., 1576; informal disciplinary punishment for minor offenses] with reference to offenses for which such disposition is proper," in which event the "Specifications and charges thus disposed of * * * will be lined out and initialed" (MCM, 1928 ed., § 33). Or, he may decide that, despite the recommendation of the investigating officer, the charges should be tried by an inferior court-martial, *i.e.*, either a special or a summary court; and he is to be guided in making this decision by the precept that "With due regard to the policies of the Department of the Army and other superiors and subject to jurisdictional limitations, charges, if tried at all, should be tried by the lowest court that has power to adjudge an appropriate and adequate punishment" (MCM, 1928 ed., § 34). But in the event that he tentatively agrees with the investigating officer's recommendation of trial by general court-martial, the appointing or convening authority must then, before ordering such a trial, "refer [the charge or charges] to his staff judge advocate for consideration and advice" (AW 70, 3d paragraph, *supra*, p. 4; MCM, 1928 ed., § 35*b*).

respects the same,[28] the investigating officer does not have the power, which the committing magistrate has, of discharging the prisoner if he finds no "probable cause to believe that an offense has been committed and that the defendant has committed it" (Rule 5(c), F. R. Crim. P.). All that the investigating officer can do is to make a *recommendation* as to "what disposition of the case should be made in the interest of justice and discipline" (AW 70, 2d paragraph, *supra*, pp. 3-4). Like the AW 70 officer, the commissioner cannot refer serious charges to trial but can only hold the accused for action by the grand jury. See Rule 7, F. R. Crim. P.

It is clear from this comparison that the AW 70 investigator is closer to the committing magistrate than to the grand jury. The reasons which have persuaded the courts to hold that the lack of a hearing before a magistrate is not a jurisdictional defect apply to the AW 70 investigation as well. But application of the grand jury analogy leads to the same result; for the grand jury rule is that irregularities, as distinct from a complete failure to comply with the Fifth Amendment, will not subject a conviction to collateral attack as jurisdictionally defective. As we shall show (pp. 60-77,

[28] Both officers are required to inform the accused of the nature of the charges against him and to advise him that he is not required to make a statement but that any statement he may make may be used against him; and the accused is permitted to cross-examine witnesses against him before both

infra), even a complete failure to observe AW 70 would not constitute a jurisdictional defect; the investigator is not as essential as the grand jury, and the Article does not have the status of the grand jury requirement in the Fifth Amendment.

But if we assume, *arguendo*, that the facts discussed in Point I do in some manner depart from the requirements of the Article, there would be at most an irregularity and not a depriviation of either the substance of the Article or of any fundamental right. Todd's failure to interview Mrs. Kerry, his subsequent appointment as assistant trial judge advocate, and his participation to a slight extent and in an impartial manner in the investigation of the case before he was designated as AW 70 investigating officer, were but minor irregularities, if they were improper at all.[29] The grand jury cases certainly suggest that such deviations from customary practices are not jurisdictional in nature and do not warrant intervention by a habeas corpus court.

We believe that the non-decisive and preliminary character of the AW 70 pre-trial investigation clearly precludes adding non-compliance with AW

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officers and to introduce evidence in his own behalf (cf. Rule 5(b) and (c), F. R. Crim. P., with AW 70, 2d paragraph, *supra*, pp. 3-4, and MCM, 1928 ed., § 35*a*). And since February 1, 1949 (see footnote 2, *supra*, pp. 2-3), the investigating officer, like the committing magistrate, is required to advise the accused of his right to counsel in the proceedings before him (cf. Rule 5(b), F. R. Crim. P., with MCM, 1949 ed., § 35*a*).

[29] In Point I we have argued that they were not improper.

70 to the fundamental defects or errors which, when established in habeas corpus proceedings, render void the proceedings and judgment of a court-martial. Traditionally, it has been held that the proceedings of courts-martial are not subject to review in the civil courts, except for the purpose of ascertaining whether the military court was legally constituted, whether it had jurisdiction of the person and subject matter, and whether it had imposed a sentence authorized by law. *Carter* v. *McClaughry*, 183 U. S. 365, 381; *In re Yamashita*, 327 U. S. 1, 25. Admittedly, respondent's conviction is not defective in any of these respects. Even assuming that a showing of some fundamental procedural unfairness in a court-martial trial creates a jurisdictional issue reviewable in habeas corpus proceedings (cf. *Johnson* v. *Zerbst*, 304 U. S. 458, 468), it is clear that a total failure to comply with AW 70 would not result in such basic unfairness. For AW 70 is not a constitutional requirement. It is enough to point out that AW 70 did not appear in the Articles of War until 1920, and still finds no equivalent in the Articles for the Government of the Navy.

Accordingly, there is no basis for concluding that compliance with AW 70 is a condition precedent to general court-martial jurisdiction, unless it appears that Congress intended AW 70 to constitute such a jurisdictional limitation. In the remainder

of this Point we shall show that the intent and understanding of Congress is to the contrary.

B. *That Congress never intended, and still does not suppose, compliance with AW 70 to be a condition precedent to a valid trial and conviction by general court-martial is conclusively indicated by the language and history of the Article.*—That Congress has never intended compliance with the provisions of AW 70 to be an absolute jurisdictional prerequisite to trial, the absence of which may be made the basis of a collateral attack on the conviction in the civil courts in habeas corpus proceedings perhaps years later, is convincingly indicated by a wealth of evidence based on the language and particularly the history of the Article.

1. To begin with, the language of AW 70 is not cast in jurisdictional terms. The pertinent part of the Article reads, "No charge *will be referred* [*i.e.*, by the appointing authority] to a general court martial for trial until after a thorough and impartial investigation thereof shall have been made." It does not say, "No general court-martial shall have power to try an accused until after a thorough and impartial investigation of the charge against him shall have been made." See CM ETO 6694, *Wynock*, 17 B. R. (ETO) 163, 179, where the non-jurisdictional nature of the words employed in the Article was remarked by the Board of Review as partial support for its view that

compliance with the Article is not an absolute jurisdictional prerequisite to trial.

Nor is the language employed in the Article such that an intent to make compliance with its requirements a jurisdictional prerequisite to trial is implied. Compare, for example, with the words of AW 70—"No charge will be referred * * *"—the much more mandatory language of the Fifth Amendment, "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury * * *"[30]

The very language of AW 70 thus strongly supports the view that it is directory rather than mandatory (see CM 323486, *Ruckman*, 72 B. R. 267, 273 (1947), *infra*, p. 70; CM ETO 4570, *Hawkins*, 13 B. R. (ETO) 57, 73-74 (1945), Appendix A, *infra*, p. 91; CM 229477, *Floyd*, 17 B. R. 149, 155 (1943), Appendix A, *infra*, p. 84; see also remarks of Undersecretary of War Royall and Assistant Judge Advocate General Hoover during the sub-

[30] And even this command of the Fifth Amendment, it is now well settled, creates merely a right or immunity in an accused which he may forego at his election; and was not intended to create a jurisdictional qualification of, or limitation upon, the power of a court to try the accused for such crimes. See Rule 7(b), Federal Rules of Criminal Procedure, promulgated by this Court, and Advisory Committee's notes thereto; *United States v. Gill*, 55 F. 2d 359, 400-403 (D. N.M.); cf. *Patton v. United States*, 281 U.S. 276, 287-298 (trial by jury). "For, if such had been the intent of the draftsmen of the Fifth Amendment, waiver of indictment would be ineffectual to remove the jurisdictional impediment thus created, since it would be impossible, of course, to confer jurisdiction of the cause by consent or stipulation.

committee hearings on H.R. 2575, 80th Cong., 1st sess., Appendix B, *infra*, at pp. 97-107), and is thus consistent with and corroborates our contention that AW 70 is in no proper sense jurisdictional.

2. The fact, as we have noted (*supra*, p. 59), that no provision comparable to AW 70 is or ever has been contained in the Articles for the Government of the Navy (34 U.S.C., 1946 ed., 1200) strongly suggests its non-jurisdictional nature. For, it would be surprising if Congress deemed one of the procedures provided for Army court-martial proceedings (and a merely pre-trial procedure at that) so vital to the proceedings as a whole that, without it, a court-martial would be utterly without power to try an accused, and yet never has seen fit to prescribe any such procedure for the Navy.

It is true that there is pending legislation which would extend the provisions of AW 70 to the Navy as well as the Army (§ 1, Art. 32, of H.R. 2498, 81st Cong., 1st sess., establishing a "Uniform Code of Military Justice"; see pp. 76-77, *infra*). But it is significant that this proposed legislation expressly provides that "failure to follow [the requirements relative to the pre-trial investigation] in any case shall not constitute jurisdictional error" (*id.*, Art. 32 (d)). The significance of this proposed amendment will be dealt with in more detail at pp. 76-77, *infra*, where it will be shown that the proposed amendment is designed to clarify existing law

rather than to change it, *i.e.*, to make explicit what has up to now been only read into the law by proper interpretation.

3. While compulsory process is available to secure the attendance of witnesses at the court-martial trial itself (AW 22, 10 U.S.C., 1946 ed., 1493),—process which is enforceable by prosecution in the civil courts (AW 23, 10 U.S.C., 1946 ed., 1494)—Congress has given the accused, with respect to witnesses at the pre-trial investigation, the opportunity merely "to cross-examine witnesses against him *if they are available*," and has directed the investigating officer to examine only "*available* witnesses requested by the accused" (AW 70, 2d paragraph, *supra*, pp. 3-4).[31] The contrast between these provisions emphasizes the much greater importance attached to testimony at the trial. Certainly it would be strange if Congress intended to make jurisdictional a mere preliminary to trial which it left unimplemented by any effective sanction to compel testimony.[32]

[31] "Ordinarily application for the attendance [at the pre-trial investigation] of any witness subject to military law will be made to such witness' immediate commanding officer. The decision of the officer exercising summary court-martial jurisdiction over the command to which the witness belongs as to availability is final. There is no provision for compelling the attendance of or for paying civilian witnesses" (MCM, 1928 ed., § 35*a*). See, as to the last sentence quoted, Dig. Op. JAG (1912-1940), § 428(4).

[32] English law during World War II provided for the compulsory attendance of civilian witnesses before American courts-martial, but not before American pre-trial investigating

4. Prior to February 1, 1949 (see footnote 2, *supra*, pp. 2-3), an accused was never entitled to counsel at the pre-trial investigation (Dig. Op. JAG (1912-1940), § 428 (3), par. 3; *Romero* v. *Squier*, 133 F. 2d 528, 532 (C.A. 9), certiorari denied, 318 U.S. 785), whereas, at least since the 1920 revision of the Articles of War, the accused before general and special courts-martial has always been entitled to counsel, either appointed by the court (AW 11, 10 U.S.C. 1482), or personally retained (AW 17, 10 U.S.C. 1488), or both (*ibid.*). This clear differentiation, up to only yesterday, between the pre-trial investigation and the trial itself in the matter of the right to counsel, further indicates that Congress has never deemed the pre-trial investigation of charges so vital and essential a part of the court-martial proceedings as a whole that, without it, the court-martial would be without jurisdiction.

Nor does the recent amendment of the law, guaranteeing the accused the right to counsel even at the pre-trial investigation (see footnote 2, *supra*, pp. 2-3), point the other way. As we have conceded (*supra*, p. 51), AW 70 confers definite, enforceable rights on the accused—rights which he may insist upon, through channels, to the Army Department itself if necessary. The recent amendment guaranteeing the accused the right of counsel at

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officers. See 1 Statutory Rules and Orders, 1942, pp. 849-850; cf. United States of America (Visiting Forces) Act, 1942, St. 5 & 6 Geo. VI, c. 31.

the pre-trial investigation merely supplements those rights. For, by being able to claim counsel as of right at the pre-trial investigation, an innocent accused is better able to show, from the outset that the charges against him are without foundation, and thus be spared the opprobrium of a general court-martial trial; at the same time, the service is saved the expensive and time-consuming task of providing general court-martial trial of unfounded or minor charges. Consequently, we submit, the recent amendment guaranteeing to the accused the right to counsel at the pre-trial investigation is entirely consistent with the view that a court-martial has jurisdiction to try an accused, notwithstanding failure to conduct a pre-trial investigation.

5. The pre-trial investigation requirements of AW 70 seem to have their origin in paragraph 76 of the *Manual for Courts-Martial* (1917) pp. 40-41, as it read prior to the 1920 amendments of the Articles of War. Paragraph 76 provided in part that, "If the officer immediately exercising summary court-martial jurisdiction over the command to which the accused belongs or pertains decides to forward the charges to superior authority he will, before so doing, either carefully investigate them himself or will cause an officer other than the officer preferring the charges to investigate them carefully and to report to

him, orally or otherwise, the result of such investigation. The officer investigating the charges will afford to the accused an opportunity to make any statement, offer any evidence, or present any matter in extenuation that he may desire to have considered in connection with the accusation against him." It does not appear that the War Department policy embodied in this paragraph was ever regarded as going to the jurisdiction of a court-martial.

In March 1919, Major General Crowder, the Judge Advocate General, wrote to Secretary of War Baker recommending that paragraph 76 of the Manual be amended by general order "so as to require the officer immediately exercising summary court-martial jurisdiction over the command to which the accused belongs either to personally conduct the investigation or else to depute it to an officer of experience, preferably not below the rank of captain, and to confront the accused with witnesses, * * * *". The purpose of this change, together with what is now the third paragraph of AW 70, was stated by General Crowder, "by laying down with greater particularity the duties and responsibilities of investigating officers and of staff judge advocates, to guard against any possibility of (a) hasty, ill-considered, or arbitrary action by any commanding officer, (b) ordering any person to trial without full and careful, as well as impartial, investigation of the

case, and until reasonable probability of his guilt has been shown; or (c) trivial cases going before general courts; and also to insure adequate preparation in all cases ordered to trial." War Department, *Military Justice During the War* (1919), p. 63.

The Congressional history of the 1920 amendments to the Articles of War throws no light upon whether what became the pre-trial investigation requirement of AW 70 was intended as a jurisdictional limitation. The brief debates were directed to more controversial matters. The report of the House Committee on Military Affairs, H. Rep. 940, 66th Cong., 2d Sess. (1920) pp. 2-3, merely states, in summarizing the salient features of the legislation, that "2. Speedy but thorough and impartial preliminary investigation will be had in all cases." Nowhere was there suggestion that a new jurisdictional limitation was being placed on courts-martial. Absent such a suggestion, there is no basis for assuming that by codifying the Army's pre-trial investigation *policy*, plus giving to the accused the right to confront the witnesses as recommended by the Judge Advocate General, Congress meant to create a new ground for setting aside the judgments of courts-martial in *habeas corpus* proceedings.

6. In 1937, Congress amended AW 70 so as to dispense with investigations of charges prior to

trial by summary and special courts-martial. Act of August 20, 1937, c. 716, § 2, 50 Stat. 724. The committee reports on the bill which became the amending Act (H. Rep. 1517 and S. Rep. 65, both 75th Cong., 1st sess., accompanying S. 1282) show that Congress intended to dispense with what amounted in practice to two trials of comparatively minor offenses.[33] But there is not the slightest suggestion in the reports, or in the letter of the Secretary of War (reproduced in the reports) recommending enactment of the proposed amendatory legislation, that elimination of any jurisdictional prerequisite to trials by inferior courts-martial was contemplated thereby. The conclusion is clear, therefore, that Congress, in enacting the 1937 amendment, did not suppose it was eliminating any such jurisdictional prerequisite. Hence, the 1937 Act and its history provide further persuasive proof that prior compliance with AW 70 is not, and never was intended to be, a vital element of the jurisdiction of a court-martial.

[33] Both reports state: "S. 1282 also proposes to amend article of war 70 for the purpose of simplifying court-martial procedure in cases referred to summary and special courts martial for trial. Present law requires that a preliminary investigation be made of all charges, however trivial, before referring the charges to a court martial for trial. The War Department reports that the great majority of cases involve only minor infractions of regulations or neglects of duty and are therefore tried by summary and special courts martial. The Department further points out that a preliminary investigation in these minor cases results, practically, in trying the cases twice, involving added and unnecessary expenditure of time by the investigating officers and witnesses."

7. Although the Judge Advocate General, in a case which arose in the early 1920s, shortly after the original enactment of AW 70, held that, *where there had been no pre-trial investigation at all*, the court-martial proceedings were void *ab initio*,[34] this decision (CM 161728, *Clark*) was expressly overruled in CM 229477, *Floyd*, 17 B. R. 149, 153-156 (1943), Appendix B, *infra*, pp. 82-87. Later holdings, representing the current view, are uniform to the effect that non-compliance with AW 70 is not a jurisdictional defect. CM 229477, *Floyd*, *supra*, 153-156; CM ETO 4570, *Hawkins*, 13 B.R. (ETO) 57, 71-75 (1945); CM ETO 6694, *Warnock*, 17 B.R. (ETO) 163, 179-180 (1945); CM 323486, *Ruckman*, 72 B.R. 267, 272-274 (1947).[35]

The Judge Advocate General's current interpretation of AW 70 is perhaps best reflected in the *Ruckman* holding of 1947, *supra*, where the Board of Review said:

> *The pre-trial investigation directed by Article of War 70 is for the benefit of the ap-*

[34] Dig. Op. JAG (1912-1940), § 428(1), par. 2: "A record of trial showed affirmatively that no investigation of the charges had been made prior to the trial. *Held:* The provisions of A.W. 70 with reference to investigating charges are mandatory and there must be a substantial compliance therewith before charges can legally be referred to for trial. A court-martial is without jurisdiction to try an accused upon charges referred to it for trial without having been first investigated in substantial compliance with the provisions of A.W. 70 and, in such a case, the court-martial proceedings are void *ab initio*. *C.M. 161728* (1924)."

[35] The cited holdings (except for the *Ruckman* holding, which, in pertinent part, follows in the text) are copied in pertinent part in Appendix A, *infra*, pp. 82-95.

pointing and referring authority and compliance with said article is not, in any sense, jurisdictional. It is an administrative procedure prescribed by Congress for the purpose of informing the appointing and referring authority as to the facts of an alleged offense against the Articles of War committed by a member of his command to the end that he may determine the proper course of disciplinary action. It is directory and not mandatory in its operation and confers upon an accused no rights the deprivation of which affects the jurisdiction of the court to which charges against him are referred for trial. And, a fortiori, the failure of the appointing or referring authority to comply with the provisions of said article does not constitute ground for annulling a sentence by general court-martial otherwise valid and enforceable. [Italics in the original]

These administrative interpretations of one of the Articles of War by the agency of review established by law within the Army are entitled to great weight, and the courts have in fact placed a very considerable reliance on opinions of the Judge Advocate General dealing with questions of military law. *Bowen* v. *Johnston*, 306 U. S. 19, 29-30; *Hironimus* v. *Durant*, 168 F. 2d 288, 289-291 (C.A. 4), certiorari denied, 335 U. S. 818; *Stout* v. *Hancock*, 146 F. 2d 741, 743-744 (C.A. 4), certiorari denied, 325 U. S. 850.

8. In 1946, the House Committee on Military Affairs, after a year's study of "court-martial procedure and the entire judicial system of the Army" (H. Rep. 2722, 79th Cong., 2d sess., p. 1), made a number of recommendations to the House, including the recommendation (*id.*, p. 3):

> That article of war 70 be amended to provide that failure to comply with its requirement for a thorough and impartial investigation before trial shall be a jurisdictional error.

Obviously, the committee did not consider compliance with AW 70 to be jurisdictional as it stands.

9. Perhaps the most persuasive evidence of all that compliance with AW 70 is not an essential jurisdictional condition of a valid court-martial trial is the fact that in 1948, Congress, being well aware, as we shall show, of the administrative construction placed on AW 70 by the Judge Advocate General's office (see pp. 69-70, *supra*), and despite the contrary recommendation of the House Committee on Military Affairs in 1946, reenacted the provisions of the Article without pertinent change. For it is a cardinal principle of statutory construction that an administrative interpretation placed on a provision of an act of Congress by the executive authority having the duty to administer the statute is deemed to be adopted by Congress when, with knowledge of the administrative construction, Congress subsequently

reenacts the provision without material alteration. *Helvering* v. *Wilshire Oil Co.*, 308 U. S. 90, 99-100; *Koshland* v. *Helvering*, 298 U. S. 441, 445; *United States* v. *Dakota-Montana Oil Co.*, 288 U. S. 459, 466; *Poe* v. *Seaborn*, 282 U. S. 101, 116.

In 1948, as we have explained in footnote 2, *supra*, p. 2, Congress reenacted, *verbatim*,[38] the second paragraph of AW 70[38] (the paragraph involved in this case), merely renumbering it as AW 46b. The bill which eventually became the 1948 Act was S. 2655, 80th Cong., 1st sess. This bill (as explained in H. Rep. 2438, 80th Cong., 2d sess. [conference report on S. 2655], p. 51) incorporated the substance of the provisions of an earlier bill, H. R. 2575, 80th Cong., 1st sess. (which had passed the House on January 15, 1948 (94 Cong. Rec. 217)). This earlier bill was entitled "A bill to amend the Articles of War to improve the administration of military justice, to provide for more effective appellate review, to insure the equalization of sentences, and for other purposes." Extensive hearings were held on H. R. 2575 before Subcommittee No. 11, Legal, of the House Committee on Armed Services, and numerous witnesses testified, including Undersecretary of War (now Secretary of the Army) Royall, Major General Green, Judge Ad-

[38] Except that, as indicated in footnote 2, a new clause was inserted in the body of the paragraph, giving the accused the right to counsel at the pre-trial investigation.

vocate General of the Army, and Brigadier General Hoover, Assistant Judge Advocate General.

In Appendix B, *infra*, pp. 95-108, we have copied pertinent excerpts from the transcript of the hearings before this subcommittee. Examination of this transcript shows that one of the principal issues with which the subcommittee was concerned was the question of whether or not AW 70—or AW 46b, as it was numbered in the bill and as it was finally numbered in the Act—should be amended so as to make compliance therewith a jurisdictional prerequisite to a valid general court-martial trial. Both Mr. Royall and General Hoover carefully explained to the subcommittee that the War Department did not consider the requirement of pretrial investigation to be "mandatory" (and hence "jurisdictional"), but only "directory," together with the reasons for that view. General Hoover also explained that the Department had been for some time officially construing the requirement in that manner ("We thought that Congress intended that it should be directory and not mandatory. Possibly, we were wrong" (*infra*, p. 105)). Inasmuch as the bill under discussion made no pertinent change in the language of the provision requiring a pre-trial investigation, Mr. Royall and General Hoover also made it clear that the Department's interpretation would not be affected unless amendatory language were inserted making the requirement "mandatory," and hence

"jurisdictional". Mr. Elston, the chairman of the subcommittee, on several occasions expressed the opinion that it might be wise to amend the bill so as to make compliance with the investigation requirement jurisdictional and Mr. Johnson, a subcommittee member, even stated it as his opinion that the requirement was already "mandatory" as it stood. Furthermore, the subcommittee had before it (Subcommittee Hearings, *ibid.*, p. 2177) the 1946 recommendation of the House Committee on Military Affairs that failure to comply with AW 70 be made a jurisdictional error (*supra*, p. 71).

For present purposes the significant facts are that the subcommittee had its attention clearly and forcefully directed to the fact that the War Department had been officially construing the pre-trial investigation clause as being non-jurisdictional; that the question of whether the bill should be amended so as to make compliance with the requirement jurisdictional was thoroughly threshed out; and that the final decision was not to amend it.

In reporting out the bill, H.R. 2575, on which the hearings were had, the full Committee on Armed Services said in pertinent part (H. Rep. 1034, 80th Cong., 1st sess., p. 7):

> 4. Should the pre-trial investigation be made mandatory and should accused be furnished counsel at such investigation?

> This question presents a more difficult problem than is apparent. In our consideration of the subject of military justice we have been guided by the principle that the basic rights of an accused should be protected without encumbering the military system in such a maze of technicalities that it fails in its purpose. Upon this premise we have concluded that an investigation should precede every general courts-martial trial but that the investigation should be considered sufficient if it has substantially protected the rights of the accused. To hold otherwise would subject every general courts-martial case to reversal for jurisdictional error on purely technical grounds.

While the above language is somewhat ambiguous, it is clear enough that the committee was answering "No" to its question, "Should the pretrial investigation be made mandatory * * *?" And since, throughout the hearings on the bill, the words "mandatory" and "jurisdictional" were used interchangeably and synonymously, it is plain that the committee meant that compliance with the pretrial investigation requirement, as contained in the bill reported out, was not intended to be "jurisdictional"—a result it achieved by merely failing to change the original language of AW 70. The inescapable conclusion, therefore, is that Congress knowingly acquiesced in the War Department's interpretation and thus, under the well settled

rule of statutory construction to which we have referred (*supra*, p. 71), ratified that interpretation.

10. On February 8, 1949, a bill (H. R. 2498, 81st Cong., 1st sess.) was introduced to establish a Uniform Code of Military Justice for the government of all three branches of the armed forces, superseding the Articles of War and Articles for the Government of the Navy. Article 32(a) and (b) of the proposed Code repeats the substance of the provisions of AW 70; Article 32(d) provides:

> The requirements of this article shall be binding on all persons administering this code, but failure to follow them in any case shall not constitute jurisdictional error.

Under the heading "Commentary" (on this Article), as contained in the publication "*Uniform Code of Military Justice:* Text, References and Commentary based on the Report of the Committee on a Uniform Code of Military Justice to the Secretary of Defense," it is stated that "Subdivision (d) is added to prevent this Article from being construed as jurisdictional in a habeas corpus proceeding. Failure to conduct an investigation required by this Article would be grounds for reversal by a reviewing authority under the Code and an intentional failure to do so would be an offense under Article 98."

It is evident, of course, that Article 32(d) of this proposed legislation is designed to eliminate all possible doubt as to whether compliance with the pre-trial investigation requirement is jurisdictional by providing expressly that it is not. It may be argued that the proposed amendment indicates an intent to change existing law in this respect. Plainly, however, such an argument would ignore the entire legislative history of the pre-trial investigation requirement, as we have reviewed it (*supra*, pp. 66-76), particularly the history immediately preceding the reenactment, without material change, of the content of AW 70 in the 1948 revision (*supra*, pp. 71-76). The contrary conclusion, we submit, is inescapable —that the object of the proposed amendment is merely to clarify and restate existing law,—to make explicit what has heretofore been the result of correct administrative interpretation.

C. *The only appellate decision on the jurisdictional issue, aside from the decision under review, supports the view that compliance with AW 70 is not jurisdictional.*—Only one appellate decision has been found, aside from the decision under review, which has passed on the question of whether compliance with AW 70 conditions the jurisdiction of a court-martial, and the ruling was that compliance is not jurisdictional. *Waite* v. *Overlade*, 164 F. 2d 722 (C.A. 7), certiorari denied, 334 U. S. 812. The holding of that case would seem to be

contained in the following language of the opinion (164 F. 2d, at 723-724):

> On appeal appellant asserts that the court-martial was without jurisdiction to try him because proper procedures had not been followed with respect to pre-trial investigation [and for other reasons].
>
> * * * * *
>
> The record on this appeal establishes that appellant was, at the time of the offense charged, subject to military law and to trial for that offense by a general court-martial. Hence, if properly constituted, there is no question as to the jurisdiction of the court of his person and of the offense.[37]

Several decisions of Courts of Appeals have expressly assumed, *arguendo,* that substantial compliance with AW 70 is jurisdictional (*Becker* v. *Webster,* 171 F. 2d 762, 764 (C.A. 2), (see footnote 23, *supra,* p. 47); *Henry* v. *Hodges,* 171 F. 2d 401, 401-402 (C.A. 2) (see pp. 47-49, *supra*); *Reilly* v. *Pescor,* 156 F. 2d 632, 634-635 (C.A. 8), certiorari denied, 329 U. S. 790).[38] *Benjamin* v.

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[37] Later in the opinion, however, the court said (164 F. 2d, at 724): "If there was any relaxation of pretrial investigation requirements not waived by appellant (and we are not convinced that there was), it certainly was not of a nature seriously to impair any of his fundamental constitutional rights."

[38] *DeWarv. Hunter,* 170 F. 2d 993, 995-997 (C.A. 10), also assumed, *arguendo* (though not expressly), that substantial compliance is jurisdictional.

Hunter, 169 F. 2d 512, 514 (C.A. 10) states in a *dictum* that "Taking into consideration the plain language and the intended purpose of the Article [AW 70], it is clear that a preliminary investigation in substantial compliance with its requirement is essential to a valid conviction and sentence by a court-martial." [39] Judge Murrah, however, who was on the panel which decided the *Benjamin* case, subsequently emphasized, in a concurring opinion in *DeWar* v. *Hunter*, 170 F. 2d 993, 997, the *obiter* nature of the above-quoted statement in the *Benjamin* case, and cautioned "those who would rely upon the isolated statement" not to take "encouragement" from it. "None of the cases cited, or which I have been able to find," Judge Murrah said, "hold or infer that failure to comply with Article 70 ousts the court-martial of jurisdiction to try one charged with an offense under Military Law." [40]

Only one district court decision has been discovered which has squarely passed on the jurisdictional question here presented. That decision, *Henry* v. *Hodges*, 76 F. Supp. 968, 970-974 (S.D.

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[39] That this statement is *dictum* is evident from consideration of what the case held, as to which, see pp. 39-40, *supra*.

[40] *Thompson* v. *Sanford*, 163 F. 2d 830 (C.A. 5), certiorari denied, 333 U.S. 856, was an affirmance, without opinion, of a decision discharging the writ in a habeas corpus proceeding in which the relator relied on an alleged deprivation of rights during the pre-trial investigation (see our brief in opposition to certiorari, No. 163 Misc., O.T. 1947). It is not possible to

N.Y.), reversed on another ground,[41] 171 F. 2d 401 (C.A. 2), held that failure to comply substantially with AW 70 is a jurisdictional error, and hence is adverse to our contention here. In view, however, of all the evidence, reviewed *supra,* at pp. 54-77, which points almost conclusively to the conclusion that compliance with AW 70 is not jurisdictional, —most of which evidence, it should be noted, the district court in the *Henry* case did not even refer to—the decision is unsupportable. Another district court decision, *Anthony* v. *Hunter* 71 F. Supp. 823 (D. Kans.), also appears to hold that failure to comply with AW 70 is a jurisdictional defect (see pp. 830-831),[42] though the actual decision, holding the court-martial sentence void, was manifestly influenced to a very great extent by a finding of fundamental and vitiating unfairness at the trial itself (see pp. 824-827, 831), which obviously is quite another matter. A third district court case, *Hicks* v. *Hiatt,* 64 F. Supp. 238 (M.D. Pa.), states that the provisions of AW 70 "are mandatory" (p. 242), but this statement is clearly *dictum;* for one thing, the whole opinion is *dictum,* since it was

know, therefore, whether the Fifth Circuit's ruling was that compliance with AW 70 is not jurisdictional or merely that there was substantial compliance in that case.

[41] I.e., on the ground that there was substantial compliance with AW 70 in that case (see pp. 47-48, *supra*).

[42] In *Arnold* v. *Cozart,* 75 F. Supp. 47 (N.D. Texas), where a petition for a writ of habeas corpus was filed by a co-defendant of Anthony (of *Anthony* v. *Hunter, supra*) arising out of the same circumstances, the jurisdiction of the court-martial was upheld.

filed after the cause had become moot (see p. 250, note 28); furthermore, apart from the mootness feature, what actually was held was that the court-martial sentence was void because of a complete denial of due process of law by reason of the "totality of errors" pervading the entire proceedings, including the pre-trial, trial, and review stages.

CONCLUSION

For the reasons stated, the court below erred both in holding that AW 70 was not obeyed in this case and also in holding that compliance with the provisions of that Article is an absolute jurisdictional prerequisite to a valid trial by general court-martial. The decision cannot be sustained if erroneous in either respect. It is therefore respectfully submitted that the judgment below should be reversed.

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MARCH 1949.

CM 229477, *Floyd*, 17 B.R. 149, 153-156 (1943):

* * * * *

6. There is nothing in the record of trial and accompanying papers to show that the requirements of Article of War 70 for a pre-trial investigation of the charges were complied with, nor does it appear that the appointing authority referred the charges to his staff judge advocate for consideration and advice prior to reference for trial. Furthermore, before acting upon the proceedings, the reviewing authority, so far as appears, did not refer the record of trial to a staff judge advocate as required by Article of War 46. Ordinarily, a presumption of regularity in the performance of their duties by the officers responsible for the fulfillment of these requirements might be indulged (par. 112*a*, M.C.M.). The circumstances of this case, however, suggest that the requirements were not in fact complied with.

The requirements for references of charges and records of trial to staff judge advocates have heretofore been held to be directory only and to have no effect upon the legality of the proceedings (CM 215720, *Pool;* CM 215721, *Klobucher;* CM 224823, *Grenzebach*). However, in 1924, the Board of Review held that the provisions of Article of War 70 and paragraph 76*a*, Manual for Courts-Martial, 1921, relating to pre-trial investigation, were jurisdictional, and that failure to comply with them rendered the proceedings of the court void *ab initio* (CM 161728, *Clark*). Subsequent holdings of the Board of Review have reached

the same result (CM 182225, *Keller;* CM 183183, *Claybaugh*). In neither of these latter cases was the holding based upon lack of jurisdiction; rather, the theory appears to have been that failure to comply with Article of War 70 was *per se* an error injuriously affecting the substantial rights of accused. Although these cases have not been expressly overruled, opinions on analogous points indicate that the first three paragraphs of Article of War 70 have come to be regarded as directory only in all respects and that failure to comply therewith is not fatal error. The following cases represent examples of this view: Sec. 376 (3), Dig. Op. J.A.G., 1912-1940 (failure to swear witness not prejudicial error where facts admitted or otherwise proved); CM 172002, *Nickerson* (failure to sign or swear to charges); CM 201563, *Davis* (report of investigation by telephone instead of in writing); CM 202511, *Godfrey* (no reinvestigation after staff judge advocate had amended charges by changing the article of war and the name of the owner of stolen property); CM 206697, *Brown* (reference of charges to accuser for investigation). The *Nickerson* case contains the following apt language:

> "The provisions of A.W. 70 requiring the charges and specifications to be sworn to, was intended for the benefit of the accused in order that he might not be subjected to frivolous or malicious prosecution and if he did not object to the irregularity and the accusation is sustained by the proof, the fact that the charge and specifications were not sworn to

would not in itself injuriously affect any of the substantial rights of the accused" (CM 172002, *Nickerson*).

The reasoning in the *Nickerson* case applies with equal logic to the present case.

The foregoing cases, together with those holding that failure to make the required references to staff judge advocates is not fatal error, justify the conclusion that the investigation required by Article of War 70 is not mandatory, and that its omission does not constitute fatal error. This conclusion coincides with the apparent Congressional intention in enacting the statute, which was to prevent "unnecessary and unjust trials" based "on flimsy evidence without a prima facie case" (Hearings before the Senate Committee on Military Affairs, on S.B. 5320, 65th Cong., 3rd Sess., p. 108; Hearings before the Subcommittee, Senate Committee on Military Affairs, on S.B. 64, 66th Cong., 1st Sess., pp. 101, 1390; Proceedings, Report of Special War Department Board on Courts-Martial and Their Procedure, July 17, 1919, p. 5). The requirements are wholly procedural and do not affect the processes of courts-martial in their determinations of guilt or innocence. Although the language of a statute is mandatory it may be regarded as directory if the legislative purpose can best be carried out by such a construction (59 C.J. 1072). Moreover, the Supreme Court has held that the provisions of the Fourth, Fifth and Sixth Amendments to the Constitution, which are mandatory in form and some of which involve procedural matters, are not limitations upon the juris-

diction of the trial court and may be waived (see, for example, *Trono* v. *United States*, 199 U. S. 521; *Diaz* v. *United States*, 223 U. S. 442; *Segourola* v. *United States*, 275 U. S. 106; *Johnson* v. *Zerbst*, 304 U. S. 458). In *United States* v. *Gill*, 55 Fed. (2d) 399, a United States district court has expressed the view that indictment by a grand jury (a procedure basically similar to investigation of charges) may be waived. In reaching this conclusion the court applied the reasoning of the Supreme Court in *Patton* v. *United States*, 281 U. S. 276, a case pertaining to waiver of trial by jury in criminal cases, guaranteed by section 2, Article III of the Constitution. In that case the Supreme Court said, among other things:

> "The record of English and colonial jurisprudence antedating the Constitution will be searched in vain for evidence that trial by jury in criminal cases was regarded as a part of the structure of government, as distinguished from a right or privilege of the accused. On the contrary, it uniformly was regarded as a valuable privilege bestowed upon the person accused of crime for the purpose of safeguarding him against the oppressive power of the King and the arbitrary or partial judgment of the court. Thus Blackstone, who held trial by jury both in civil and criminal cases in such esteem that he called it 'the glory of the English law', nevertheless looked upon it as a 'privilege', albeit 'the most transcendent privilege which any subject can enjoy.'

* * * * *

"In the light of the foregoing it is reasonable to conclude that the framers of the Constitution simply were intent upon preserving the right of trial by jury primarily for the protection of the accused.

* * * * *

"Upon this view of the constitutional provisions we conclude that Article III, Section 2, is not jurisdictional, but was meant to confer a right upon the accused which he may forego at his election. To deny his power to do so, is to convert a privilege into an imperative requirement" (*Patton* v. *United States*, 281 U. S. 276, 296-298).

For the foregoing reasons it is the opinion of the Board of Review that the provisions of Article of War 70 requiring investigation of the charges before trial are not jurisdictional, and that under the circumstances of the present case failure to comply with them did not injuriously affect the substantial rights of accused. To quote from a penetrating review by the staff judge advocate in the Brown case (CM 206697):

"If * * * a thorough and impartial investigation is not had, [and] nevertheless the charges are referred for trial, a fair trial is had which results in conviction, and the sentence is approved; all that the accused has suffered is *injuria sine damno*, a technical wrong which did him no harm. The law ought not to admit that a guilty man is harmed if tried, convicted, and sentenced; and, if he has had a

> fair trial and has been convicted, the law, if it does not stultify itself, must assume him to have been guilty. The case therefore falls within the exact language of A.W. 37. * * * It was no part of the purpose of the authors of A.W. 70 to prevent the trial, conviction, and punishment of a guilty man."

In so far as the Clark, Keller and Claybaugh cases are in conflict with this holding, they should no longer be followed.

It may be noted that the appellate jurisdiction granted to the Board of Review by Article of War 50½ relates entirely to the "record of trial" and on its face is not concerned with extraneous matters of procedure. However, the conclusions of the Board are not based upon this ground.

* * * * *

CM ETO 4570, *Hawkins*, 13 B.R. (ETO) 57, 71-75 (1945):

* * * * *

7. The papers accompanying the record of trial show that the charge laid under the 75th Article of War was investigated as required by AW 70 and par. 35, MCM, 1928. Thereafter the staff judge advocate cancelled the charge thus investigated and submitted to the Commanding General of the 35th Infantry Division the Charge under Articles of War 58-28 upon which accused was arraigned and tried. The charge sheet was not re-signed and was not re-verified by the accuser and no further investigation was made of the new charge. It has

been established that the investigation of the charge is an administrative process intended primarily for the benefit of the appointing authority and is not jurisdictional (CM 229477, *Floyd*, 17 B.R. 149). It has also been determined that:

> "The provision of AW 70 requiring the charges and specifications to be sworn to, was intended for the benefit of the accused in order that he might not be subjected to frivolous or malicious prosecution, and if he did not object to the irregularity and the accusation is sustained by the proof, the fact that the charge and specifications were not sworn to would not in itself injuriously affect any of the substantial rights of the accused" (CM 172002, *Nickerson*).

The situation which arose in the present case was strikingly foreshadowed by the facts involved in CM ETO 106, *Orbon*, which received painstaking consideration by the Board of Review (sitting in the European Theater of Operation). The Board's discussion of this issue is comprehensive and cogent. The following quotation therefrom is decisive in the instant case:

> "While the charges form the basis of the investigation it is the *transaction* or *event* which gave rise to the charges which is the true subject of investigation. This conclusion is supported by: (a) the fact that 'no appointing authority shall direct the trial of any charge by general court-martial until he has considered the advice of his staff judge

advocate *based on all of the information relating to the case.*' (Italics supplied) (MCM, sec. 34) and (b) 'The investigation will include inquiries as to the truth of the *matter* set forth in said charges, form of charges, and *what disposition of the case should be made in the interest of justice and discipline.*' (Italics supplied) (AW 70). The italic words and clauses above quoted indicate clearly that the investigation envelops the entire situation. It may be that the charges are inappropriate to cover the offense or offenses revealed by the investigation. Hence, the convening authority is empowered to amend and adjust and should amend and adjust the charges to meet the facts (MCM, sec. 34) before referring the charges for trial. The only limitation on his authority in this respect is that the 'redraft does not include any substantial change *or include* any person, offense, or *matter not fairly included in the charges as received.*' (Italics supplied) (MCM, sec. 34). This limitation prevents the insertion of a new charge which is alien to the situation revealed by the facts disclosed, but it does not prevent the convening authority from redrafting or re-stating the charges so as to make them allege an offense or offenses supported by the facts discovered and shown by the report of investigation. An opposite conclusion leads to the absurd situation of requiring a new investigation which would yield the exact state of facts as the first investigation. It would be a futile effort, which would

delay the trial and not protect any rights of the accused. This construction of AW 70 is supported in spirit by C.M. 179142 (1928), C.M. 182078 (1928), and JAG, 220.26, Aug. 30, 1932, digested in Dig. Ops. JAG. 1912-40, sec. 428 (1), pg. 292. It is, therefore, the opinion of the Board of Review that there was no violation of AW 70, in the instant case, because a new and additional investigation was not made on Charge II and its Specification, and that the court acquired jurisdiction to try the same.

However, the accused was compelled to go to trial upon a Charge and Specification which were not supported by the oath of the accuser. It has been held that the quoted provision of AW 70, requiring that the charges be supported by the oath of the accuser is *procedural*, and not *jurisdictional*, is for the benefit of the accused and may be waived by accused either explicitly or by failure to object to the irregularity (CM 197674 (1932), sec. 1267, Supp. VIII. Dig. Ops. JAG, 1912-30; C.M. 210612 (1939), *Maddox*; C.M. 220625 (1942), *Gentry*) (Cf: sec. 1267, Dig. Ops. JAG. 1912-30). In the case timely and proper objection was made. There was no waiver, either expressed or implied, of the irregularity.

The supporting of charges by the oath of the accuser is not universally required. MCM, 31, particularly provides that the charges need not be sworn to if the accuser believes in the innocence of the accused.. In criminal prosecutions, in the civil courts the absence of a

verification to an information where one is required by statute, is ground for quashing the information, but it does not render the information void or deprive the court of jurisdiction, and, after committing error in overruling a motion to quash on this ground, the court still holds jurisdiction. (31 C.J., sec. 166, pg. 648). The record of trial in this case fails to show how accused was prejudiced in any respect by the court's ruling which compelled him to stand trial on Charge II and Specification although it was not verified. Nothing appears in the record of trial that accused's rights were injuriously affected by this irregularity in pleading. He was neither surprised nor misled as to the charges against him. The accused made no attempt to controvert the prosecution's evidence which support the conviction of violation of AW 63 (Charge II and Specification). He denied all knowledge of his conduct because of being intoxicated. Under such circumstances the verification of Charge II and Specification would have added nothing to his defense, nor does its absence injure him."

The *Nickerson* and *Floyd* cases, above cited, definitely determine that the requirements of the first three paragraphs of the 70th Article of War are directory and not mandatory and the failure to observe all or any of them neither deprives the court of jurisdiction nor do such defects and imperfections in the pre-trial procedure necessarily prejudice the substantial rights of an accused.

In the instant case the accused made no objection to the charge on the ground that it was not sworn to, but the absence of any objection may be explained by the fact that the irregularity does not affirmatively appear upon the face of the charge sheet. It only so appears when examination is made of the papers and documents accompanying the record of trial, including the staff judge advocate's report and recommendation. The Board of Review therefore prefers not to place its conclusion upon the narrow ground that accused failed to make proper objection at trial. It will be assumed that had he known of the irregularity he would have objected.

Had such objection been made and sustained what would it have yielded him? Such objection is in the nature of a plea in abatement, which upon being sustained only delays the trial; it does not terminate it. If the objection had been upheld then an application for a continuance would have been in order. It is obvious that a denial of the application would not have injured accused's substantial rights, (MCM, 1928, par. 66, pp. 51-52). The substituted Charge and Specification, although unsworn fully informed accused of the nature of the charge against him. The addition of an oath to the charge would not have changed or altered the issues in any degree. The trial proceedings based on sworn charges would not differ from those based on the unsworn charges. The trial would have been as fair and just on one as on the other. All the accused would have suffered was *injuria sine damno*, a technical wrong which could have

done him no harm (CM 206697, *Brown*). The purpose of the requirement that the charges be sworn to by the accuser was to protect an accused from frivolous or malicious prosecution (CM 172002, *Nickerson, supra*). There was no thwarting of such purpose in the practice followed herein. The irregularity involved in the prosecution's arraigning and trying accused upon an unsworn charge, although not condoned, was a harmless error, within the provisions of the 37th Article of War.

The following comment of the Board of Review in the *Floyd* case is adopted:

> "It may be noted that the appellate jurisdiction granted to the Board of Review by Article of War 50½ relates entirely to the 'record of trial' and on its face is not concerned with extraneous matters of procedure. However, the conclusions of the Board are not based upon this ground" (Ibid., 17 BR 149, 156).

The Board of Review is clearly of the opinion that the practice followed in the instant case affords no reason for disturbing the findings of the Court that accused was guilty of desertion.

* * * * *

CM ETO 6694, *Warnock*, 17 B. R. (ETO) 163, 179-180 (1945):

* * * * *

The foregoing holdings support the conclusion that violations of the provisions of the 70th Article of War do not affect the jurisdiction of the court, and except under extraordinary or unusual circumstances do not constitute error prejudicial to

the substantial rights of accused. This conception of the 70th Article of War views the requirements thereof as administrative in nature, and of immediate concern to the authority holding general court-martial jurisdiction. Many of the provisions are intended for his benefit in order to enable him to act fairly and intelligently upon the charges. Other requirements of the Article are for the benefit of the accused and are intended to protect him against unwarranted or malicious prosecution of unfounded charges. It is the duty and function of the authority referring the charges for trial to insist that there be reasonable compliance in good faith with this Article of War in preparing and investigating the charges. Usually the requirements of the 70th Article of War do not concern the court after reference of the charges to it for trial. The action of the appointing and referring authority is binding upon the court in respect to such matters (CM ETO 4570, *Hawkins*, supra; CM ETO 5155, *Carroll* and *D'Elia*, supra).

Although compliance with the requirements of the 70th Article of War under the foregoing interpretation of the Article is a matter of primary responsibility of the officer empowered to appoint general courts-martial, the Board of Review believes that it may with propriety express its apprehension and concern over the practice by staff judge advocates of inserting new charges on a charge sheet without affording opportunity to the accuser of either confirming or disaffirming his signature and oath to the original charge sheet. While the practice was legally permissible under the circumstances of the instant case, Captain Raley's reaction when his attention was attracted

to the alterations of and additions to the charge sheet is fairly indicative of the attitude of most men when written matter has been placed over their signatures without their knowledge and consent. In the Army, where an officer's signature is given the greatest credence and faith, it is particularly desirable that an accuser be fully informed as to substantial changes in the charge which he has supported by his signature and oath, and be afforded the opportunity of withdrawing his name as accuser or of confirming the alterations and changes made in the charges.

The following comment of the Board of Review in the *Floyd* case, supra, is quoted with approval:

> "It may be noted that the appellate jurisdiction granted to the Board of Review by Article of War 50½ relates entirely to the 'record of trial' and on its face is not concerned with extraneous matters of procedure. However, the conclusions of the Board are not based on this ground" (17 B.R. 149, 156).

APPENDIX B

SUBCOMMITTEE HEARINGS ON H.R. 2575, TO AMEND THE ARTICLES OF WAR TO IMPROVE THE ADMINISTRATION OF MILITARY JUSTICE, TO PROVIDE FOR MORE EFFECTIVE APPELLATE REVIEW, TO INSURE THE EQUALIZATION OF SENTENCES, AND FOR OTHER PURPOSES

House of Representatives,
Committee on Armed Services,
Subcommittee No. 11, Legal,
Monday, April 14, 1947.

* * * * *

[Pp. 1924-1925.]

Mr. Elston [Chairman of the Subcommittee]. One of the very serious objections to the present system, or at least as it was administered during the war, was that there was not a sufficient pretrial investigation of the facts. What have you to say about that?

Mr Royall [Undersecretary of War; now Secretary of the Army]. Well, sir, I think that was greatly exaggerated. As a matter of fact, the American Bar Association Committee, in studying numerous cases, I don't think found a single instance where they thought an innocent man had been convicted. Now, I don't mean there weren't any. You couldn't have thousands upon thousands of cases without making a mistake. Nobody could do that, but there really wasn't any difficulty along that score, an [y] appreciable difficulty. Certainly the record was much better than any civil court that I ever knew of. So whether or not there was an adequate preliminary investigation I don't think played any substantial part in the final result.

However, our bill does not make it a jurisdictional factor, but it does contemplate a thorough investigation. In the States in which I have practiced law, preliminary investigations are never a jurisdictional requirement. I know they are not in the Federal courts, and not in any State where I have tried a criminal case, and I have tried criminal cases in several States. We would be departing radically from accepted judicial practice, generally throughout the United States, if we made that a juris-

dictional requirement. That is really the difference between the Durham bill and this, as I understand.

* * * * * *

Mr. Elston. There was some complaint, also, that because there was an inadequate pre-trial investigation, evidence got away.

Mr. Royall. Yes, sir.

Mr. Elston. Armies were on the move and witnesses were present today and gone tomorrow, as a consequence of which there was an incomplete preliminary investigation and much evidence that might have been helpful to an accused was lost. So don't you think, under such circumstances, there should be some mandatory provision with respect to an adequate preliminary investigation?

Mr. Royall. I would not make it mandatory, for the reasons I have stated.

Mr. Norblad. You would not, sir?

Mr. Royall. Would not make it mandatory. That is also a close question. I don't think you can be too dogmatic either way on that. I think it is sufficient as we have it because it would be done in every case, unless there were some very unusual circumstances. In practice it would be done, under our provisions.

Mr. Elston. What would be the reason why it couldn't be done?

Mr. Royall. Well, this is another reason: The more legal technicalities we inject into the court-martial system—jurisdictional requirements, one of the principal things lawyers who are technical like to bring up on appeal—

the more we have of those, the more we are going to hurt the system.

The reason the court martial has done better in my opinion than any civil system that I know of, in reaching just results, is because we have kept those legal technicalities to a minimum.

* * * * *

I would shy away from jurisdictional requirements. When you get a jurisdictional requirement which goes contrary to the normal civil court procedure, I am sort of inclined against it.

* * * * *

[Pp. 2058-2061.]

General Hoover [Assistant Judge Advocate General of the Army]. * * * The provisions with respect to charges and pre-trial investigations as incorporated in the proposed article 46 do not differ from those in the present article 70 except that the punitive provisions now existing are retained in article 70. I may say that the War Department feels that the pretrial investigation as at present required by article 70, and which is to be carried on by the new article 46, has been of inestimable value in the administration of military justice. To make a long story short, it eliminates most of the errors possible in preferring and disposing of charges. It prevents a great many trials and results in trials by inferior courts in a great many cases where the men might otherwise be tried by general courts-martial.

* * * * *

Mr. Elston. General, would you consider it jurisdictional error if this section were not complied with?

General Hoover. No, sir; if it were made jurisdictional error, we would inject into our trial procedure a difficult and highly technical situation. We think that the guilt or innocence of the man ought to be determined at the trial. If we inquire into what was done before the trial from the standpoint of the commission of error, we are just asking for trouble. I should like to say, in that connection, that in my experience I have not seen more than a half dozen cases in which there has not been a reported investigation or an investigation in fact. Some of the investigations are done better than others and some of them aren't done well, we must concede that. But the object of the investigation is normally fully served before the man goes to trial. If he goes to trial in a case in which a better investigation might have prevented trial, an [y] possible injustice can be prevented at the trial and by action after the trial.

Mr. Elston. General, suppose you have the case where a commanding officer does not comply with this section. He doesn't permit the accused to examine witnesses at the preliminary hearing and arbitrarily files a charge and presents it to a general court martial for hearing. What if anything can be done about it, if it isn't a jurisdictional error to so act?

General Hoover. If it appeared in the Office of the Judge Advocate General that the man had been deprived of any substantial

right, such as the presentation of testimony in his own behalf, or something of that kind, it would be possible for us to say that the error injuriously affected the rights of the accused and that the sentence should therefore be vacated. The case of real injury would be rare. Ordinarily guilt or innocence is and should be determined at the trial and not by what occurred prior to the trial.

Mr. Elston. A great many things can be developed at a preliminary investigation, if the accused is given the means and the opportunity to present and examine witnesses.

General Hoover. Yes, sir.

Mr. Elston. And insist upon the presentation of certain facts.

General Hoover. Yes, sir.

Mr. Elston. If he is deprived of that opportunity, I don't know why it shouldn't be jurisdictional error.

General Hoover. We would be considering as jurisdictional error something that happened beforehand and that really had no bearing on the man's guilt or innocence. The accused has a complete opportunity to meet the issue of guilt or innocence at the time of the trial.

Mr. Elston. If you don't make it jurisdictional error, then this section is meaningless. It is not mandatory.

General Hoover. It is not mandatory, but I think it is far from meaningless, Mr. Elston, because it has been most effectively used in the Army.

* * * * *

Mr. Elston. But it is purely directory.

General Hoover. It is directory as it stands, but as a directory provision I think it has been extremely useful in advancing justice, in expediting trials, and in preventing unnecessary trials.

Mr. Elston. I don't doubt that for a moment, but I can see where an accused person would lose some of his very substantial rights if he were not given the opportunity to appear, to examine witnesses, to insist on the presentation of certain facts, and to be fully protected, the same as he would be at any preliminary hearing in a court of law. If you simply make it permissive it may be that you haven't gone far enough.

General Hoover. Well, if the failure to conduct the investigation in the manner required—

Mr. Elston. How are you going to determine whether or not substantial justice had been done? Suppose he were insisting, for example, that certain testimony if presented would have absolved him and nothing was done about it. How is a reviewing court going to know what would have happened had that evidence been presented?

General Hoover. We would have to go to the report of investigation or to anything that he might present in connection with it at the trial. We have had these attacks made in the course of the trial by the accused persons upon the investigations. I think the facts are usually developed. And I think we must come back, in defending the directory nature of it,

to the fact that guilt or innocence is to be determined at the trial and that the accused is there afforded every opportunity to meet the issues.

Mr. Brooks. General, what would you do if you had a commanding officer who just customarily ignored the requirements of preliminary examination?

General Hoover. I have in my experience never known one to do so. I think he would be brought to account very quickly if that were discovered.

Mr. Brooks. Well, does the Judge Advocate General's Department have authority over an officer of that character?

General Hoover. We would have no direct authority. We would have to bring the matter to the attention of the responsible officer in command channels.

Mr. Brooks. You would consider it a violation of the rules and regulations of the Army?

General Hoover. Yes, sir; we would bring it to the attention of the general commanding.

Mr. Brooks. Now, in civilian life, of course, if a man in the Federal court is indicted he is not entitled to any preliminary examination, but if it is on a bill of information he is entitled to appear and examine witnesses, as I understand the law. You would consider every complaint in the Army an indictment, so to speak, for that purpose?

General Hoover. Yes, sir; every set of charges. Of course, it is contemplated that the man will be afforded an opportunity to cross-examine the witnesses, and to call any witnesses—

Mr. Brooks. That is on trial, but not in a preliminary examination.

General Hoover. On both occasions. I should like to correct any impression that the present article of war seventy is not followed generally. It is followed generally.

Mr. Elston. Well, General, if it is followed generally, then I don't see what you have to worry about, if it is made jurisdictional error not to follow it.

General Hoover. We don't consider it a jurisdictional matter. We look at the substance, rather than the form, that is all. We should gain nothing of substance if the law were treated as mandatory.

Mr. Johnson. The administration is what does that, not the law. The law is absolutely mandatory, I think, the way it reads. The word "shall" means exactly that. So the way you handle it, by administrative decree, you declare that to be only a directory provision of the article.

General Hoover. The present interpretation of the article making it directory only is based on an opinion of the Board of Review, with which I personally had something to do. It is based on the practice in the Federal courts. It follows the decisions of the Federal judiciary. And I think it is sound from the legal standpoint. I think we would consider it as error, all right, if there were a failure to comply with the article, but there is a difference between treating it as error and treating it as jurisdictional error.

Mr. Brooks. That is right.

General Hoover. And that is what we are trying to avoid, and what we tried to avoid in handing down that opinion.

Mr. Johnson of California. Well, is it your opinion, based on your experience, that the subsequent trial corrects the violation of this provision?

General Hoover. Yes, in the normal case.

Mr. Johnson of California. Because he has a chance to present his entire case.

General Hoover. Yes. If he had anything that he wants to present, he can present it at the trial. If he is prevented from presenting it at the trial, then it is error on the trial, which we can certainly consider.

* * * * *

[Pp. 2064-2065.]

Mr. Johnson of California. That is what you do, but the way I look at it you have taken this law, which I think is mandatory in its phrasing, and have gotten around it in the way you administer it and the way you have handled it.

Now, if you had a clause like that in there, to sustain by legal phrasing and by an actual statute what you do, I think it would be much better.

General Hoover. Well, if we make it mandatory, Mr. Johnson, then we get away from the substantial justice principle.

Mr. Johnson of California. No. What I am asking you is this: If you had a clause similar

to the provisions in our Constitution, that the reviewing board, or in our State the appellate court, after reviewing the entire record and even despite the alleged technical violations of the defendant's right they can still sustain the trial court if they find substantial justice has been afforded him, it might be advisable. That is what they do out there to handle the situation.

General Hoover. That is what we do. Substantiality of justice is the argument in support of our interpretation of this clause.

Mr. Johnson. Yes, but there is no statutory authority for you to do that, as I see it. To overcome this specific provision of the article.

General Hoover. We thought that Congress intended that it should be directory and not mandatory. Possibly we were wrong.

Mr. Johnson. If we made it jurisdictional error not to comply with the provisions of the statute it would be mandatory, wouldn't it?

General Hoover. Then it would be mandatory, and if the investigation were not made, at least in substantial conformity with the requirements, we would have to set aside the sentence although the man came in and pleaded guilty. That illustrates the point. It is an extreme case, of course.

* * * * *

[P. 2146.]

Mr. Royall. * * * On the question of preliminary investigation—I am not taking these questions up quite in the order I gave them—

we follow the American Bar Association report exactly. We have provision for requiring a preliminary investigation. The only issue is whether it should be made jurisdictional. The feeling we have was partially stated by me before. First, we believe it more analogous to the civil court procedure not to make it jurisdictional. Then we feel that if a man is convicted on evidence produced in court and his guilt is proven, it is really nothing more than a technicality to go back and say, "He is guilty, but the case wasn't investigated enough in the first instance." The investigation itself cannot affect the evidence produced at the trial. The accused still has a chance to put up his defense, and under our suggestions made here he has an equal power with the prosecution to provide the evidence for his defense.

We would like to get away from technicalities. The one advantage of the court-martial system over the civil system which stands out most, is the lack of purely technical legal questions that can be raised, and that is the reason I feel—and the American Bar Association committee at least implied—that the court-martial system—even as it is—gives substantial justice—does better than civil courts. This is all I want to say about that. I think it worth the committee's reexamination and close examination to see if we can't leave preliminary examination as a requirement, but not make it a technical ground on appeal.

* * * * *

[Pp. 2152-2153.]

Mr. Kilday. Now, on the question of a mandatory preliminary investigation, I take it there is quite a distinction, of course, between a mandatory investigation and a mandatory preliminary hearing, for instance, such as we have in the civil courts.

Mr. Royall. There is some distinction there.

Mr. Kilday. But isn't it your belief that a thorough preliminary investigation is in the interest of prosecution, rather than in the interest of the defense? In other words, when the case is thoroughly investigated and all of the evidence is assembled, there is much more likelihood of a guilty man being convicted.

Mr. Royall. We believe very strongly in it and we will provide for it as strongly as we can, without making it grounds for a technical appeal. That is the only difference we have.

Mr. Kilday. In doing so you don't make it more strenuous on the man who might be accused, I mean in not making it a jurisdictional question. That would be, in my opinion, in favor of the accused, rather than in favor of the prosecution.

Mr. Royall. It would be in favor of the accused.

Mr. Kilday. I make that point—

Mr. Royall. We all know, in civil life, those of us who have tried criminal cases for the defendant, we look with technical zeal at the grand jury proceedings and try to see whether the jury was properly drawn, and all that. We

know when we do so, that we are just being technical. We know it hasn't anything much to do with the guilt or innocence of the accused. I think we want to avoid just such technicalities. We should insist to the limit on a preliminary investigation, short of making it a technicality.

* * * * *

IN THE

Supreme Court of the United States

October 1948 Term

No. 457

457

WILLIAM H. HIATT, United States Penitentiary, Lewisburg, Pennsylvania,

Petitioner,

—*v.*—

BERNARD W. SMITH,

Respondent.

BRIEF IN OPPOSITION TO GRANTING CERTIORARI.

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Statutes Cited:

Halsbury's Laws of England, Criminal Law and Procedure, 2nd Ed., Vol. IX, Part VI, Sec. 314 32
Manual for Court-Martial of the U. S. Army, 1928, Corrected to Oct. 20, 1943, Sec. 30, 35, 44d 22, 39, 47
Penal Law of the State of N. Y., Sec. 2013 33
War Department's Basic Field Manual and Soldier Handbook, July 23, 1941, P. 193-194 38

Miscellaneous:

American Ephemeris & Nautical Almanac, 1944, Published by U. S. Naval Observatory 37
Meteorological Glossary, 3rd Ed., Published by the Meteorological Office of the British Air Ministry ... 37
Puttkammer, Consent in Rape, 1925, 19 Ill. Law Review, 410, 421 ..... 29, 33
State of New York Law Revision Commission, Report, Recommendations and Studies, 1937, P. 473 ... 33

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Respondent.

BRIEF IN OPPOSITION TO GRANTING OF CERTIORARI.

Statement.

The defendant, Bernard Smith, a U. S. soldier stationed in England, was charged with a violation of A. W. 92, the rape of Sheila Dale, and A. W. 93, "with intent to commit a felony, viz., rape committed an assault on Miriam Florence Cullum on Tuesday, July 11, 1944, at approximately 11 o'clock in the evening of said day."

The offenses were alleged to have been committed between 10:40 P. M. Tuesday, July 11, 1944, in the Cullum case, and in the Sheila Dale case, between 11:30 and 11:45 P. M. of that day. Each offense took place in the same neighborhood, about five miles away from camp. The terrain was very hilly and upgrade from the scene of the offense to the camp. Complaint was made to Constable Felton in the Cullum case six days later on July 17th, when he called at her home. Complaint was made in the Dale case the next day, about 10 A. M., July 12th, when Dr. Beckett summoned the police, stating that the Dale girl consulted him complaining that she had been raped, that no contrageptive was used and she was worried lest she be pregnant. Neither girl nor their families called the police. On July 18th, about 11 A. M. Constable Felton, a British police officer, called at the Raydon Aerodrome, and consulted with 1st. Todd, Provost Marshall, concerning the incident. He gave a description of the assailant of the girls and thereupon Todd sent for a number of men who might be suspect. After nine men had been interviewed the defendant was summoned. The Cullum girl claimed that when assaulted she bit her assailant's *right hand* near the thumb. No description of the bite was given. No mention was made as to whether blood was drawn or whether the bite caused a laceration. On interviewing the defendant in the presence of American officers, including Provost Marshall Todd who conducted the examination, under A. W. 24, Constable Felton grabbed the defendant's hands and thereupon found a laceration of the *left* hand. The defendant stated that he had cut his hand with a cleaver opening cans of milk. Sgt. Pelletier, his superior, corroborated this explanation. The defendant was then confined to the guard house by Todd. At 7:15 P. M. on July 18th, a lineup was arranged by Todd wherein the defendant was identified by

both girls. The defendant claims the lineup was conducted in a fraudulent manner. Constable Felton provided Todd prior to the lineup with a statement signed by the Dale girl dated July 12, 1944, and a statement of the Cullum girl was taken at 7 o'clock on July 17, 1944. Each girl supplemented her statement at the Raydon Aerodrome immediately after the lineup. Todd testified the lineup was conducted about a week after he was appointed investigating officer. All government witnesses testified the lineup took place within 4 hours after Todd first heard of the case and prior to July 19, 1944, the date of the charges. The Government now admits Todd erred re the date. Charges were signed by Capt. Ernest P. MacGregor. The impartial investigator pursuant to the Manual for Courts Martial could not legally be appointed prior to the signing of the charges. Todd knew of and testified to this. Todd conducted the lineup and took the statement as Provost Marshall, then reported same to his superior officer, having placed Smith under arrest at 4 P. M. that afternoon. The superior officer appointed Todd as impartial investigator to determine the accuracy of the charges that Todd himself instigated. The actual appointment of Todd or the date of his appointment was claimed to be missing from the Government record. Attorney for the defendant found same in the record on the date the appeal was argued, April 8, 1948. Subsequent to his appointment as impartial investigator under A. W. 70 he again talked to the complainants, Dale and Cullum, and interviewed nine witnesses at the request of the defendant.

Todd made no investigation as to the reputation of either complainant as to chastity or virtue, and he did not interrogate one Mrs. Kerry, the only disinterested witness re identify, who was with the complainant Cullum and the

assailant and walked some distance with them immediately prior to the alleged assault. Todd stated that she was not a necessary witness in that the defendant didn't request her testimony and the Government did not need her testimony. Smith testified at the hearing that Todd advised him not to have Mrs. Kerry called as a witness. Neither girl had any information concerning the assault on the other girl prior to the meeting, so that the conviction in each case rested on the uncorroborated and unsupported testimony of each complainant. The defendant produced a witness who lived in the locality who testified that the Dale girl had a bad reputation for chastity. She was not allowed to testify concerning the reputation of the Cullum girl. The physician called by Dale said he would not say a rape had occurred.

No physician was called by the Government to examine the defendant and ascertain whether the laceration on the defendant's hand was caused by a bite or a cleaver. A bite would cause two lacerations from the upper and lower teeth. There is evidence of only one laceration such as could come from a cleaver.

The defendant was represented on the trial by an air corps officer who was not a lawyer, although two men whom the Government claimed were lawyers sat in the trial as counsel. Neither participated in the trial. The Government was represented by two members of the Judge Advocate General's office, who were attorneys.

Six soldiers, including the sentry on the gate, testified the defendant was in camp at the time of the assault. The time of the assault, to wit: 11 to 11:45 P. M., fixed by Dale, was further corroborated by the fact that she couldn't ride her bicycle in that it had no lights and it was getting pretty

dark (R. 250). The U. S. Nautical Almanac verifies this statement. English war time was two hours faster than standard time.

On the trial Lt. Todd acted as Asst. Trial Judge Advocate.

The defendant was found guilty and sentenced to life imprisonment, which has been reduced to 12 years. He is now incarcerated in Lewisburg Penitentiary.

A rule permitting a habeas corpus was filed by Honorable Frederick Follmer, U. S. District Judge. After a hearing the application for habeas corpus was denied. The Government included in the record before Judge Follmer C. I. D. reports which was not part of the trial and which the attorney for the petitioner was not permitted to see at the time on the ground they were confidential communications. Judge Follmer quoted from the C. I. D. reports in his opinion.

The defendant requested the Circuit Court to decide the case on the merits and did not ask for a technical reversal. The defendant calls the attention of the Court to the fact that the C. I. D. report is not a proper part of the case and is contained at Page 79 to 82 of the record. This report was not before the court martial.

The District Court wrote an opinion denying the habeas corpus on August 7, 1947, from which decision the defendant appealed to the Court of Appeals for the Third Circuit. The case was argued April 8, 1948, and decided September 14, 1948, which decision reversed the District Court and directed the defendant be released from custody forthwith.

From that decision the Government prays for a writ of certiorari to this Court.

POINT I.

The impartial and thorough investigation under A. W. 70 is jurisdictional.

The courts have universally held or conceded that the thorough and impartial investigation is a jurisdictional requirement.

(*Hicks v. Hiatt*, 64 F. Sup. 238;

Anthony v. Hunter, 71 F. Sup. 823;

Benjamin v. Hunter, 162 F. 2d 512;

Henry v. Hodges, 76 F. Sup. 968, reversed in that there was substantial compliance of A. W. 70;

University of Chicago Law Review No. 13 at 494;

Illinois Law Review No. 41 at 260;

Waite v. Overlade, 164 F. 2d 722, certiorari denied 334 U. S. 412;

De War v. Hunter, ... F. 2d ..., decided 12-3-48;

Redlen v. Pescor, 156 F. 2d 632.)

The Board of Review held as follows in 1924:

"... However, in 1924, the Board of Review held that the provisions of Article of War 70 and paragraphs 76a, Manual for Courts-Martial, 1921, relating

to pre-trial investigation, were jurisdictional, and that failure to comply with them rendered the proceedings of the court void ab initio (CM 161728, Clarke). Subsequent holdings of the Board of Review have reached the same result (CM 182225, Keller; CM 183183, Claybaugh). In neither of these latter cases was the holding based upon lack of jurisdiction; rather the theory appears to have been that failure to comply with Article of War 70 was per se an error injuriously affecting the substantial rights of the accused." (CM 299477 (Floyd 17 Br 149, 153 156 (decided February 2, 1943.)

There is no decision cited anywhere by the Government indicating that substantial compliance with A. W. 70 is not a jurisdictional necessity.

The Board of Review reports cited by the Government are not available to defendant. The defendant is advised that the decision in the *Floyd* case, supra, wherein the Board of Review stated that A. W. 70 was not jurisdictional, cited by the Government was in fact dicta. Under the Federal Constitution all persons are entitled to due process of law. A citizen in the United States Army is subject to court martial law in lieu of the civilian law. The law under the Articles of War is intended to give the defendant substantial justice, although same is somewhat streamlined. In that many of the protections afforded a civilian citizen are denied a soldier, the few safeguards given a soldier must be therefore more rigidly adhered to and respected. Comparing the rights of a soldier and citizen, the following chart as to relatives rights is submitted:

	Citizen	Soldier
1. Entitled to counsel at all stages of the proceeding	Yes	No
2. Prompt arraignment before a magistrate and be confronted by his accuser on an examination	Yes	No
3. To have case considered by grand jury	Yes	No
4. To be tried by an impartial jury of citizens	Yes	No
5. To subpoena witnesses and cross examine them[2].	Yes	No
6. To be tried before an impartial court which is not accountable to anyone for its decision	Yes	No
7. To argue appeals by counsel	Yes	No

The Government contends that A. W. 70 is for the guidance and benefit of the superiors only and that the defendant has no rights thereunder.

Hence a soldier is entitled to be tried by a group of officers appointed by his commander in lieu of the safeguards a citizen is entitled to as delineated above.

The Government offers little incentive to a citizen to become a member of the armed forces of the United States.

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[1] The soldier is only entitled to counsel at the court martial hearing. He is entitled to none at the A. W. 70 investigation (Government Brief, P. 20).

[2] The soldier can have witnesses "if available." There is no power of subpoena (Government Brief, P. 20).

In addition to pledging his life if needs be in the defense of his country, as a matter of law the Government contends all rights under the Constitution are substantially denied him.

It has been held that soldiers or men in the armed forces are entitled to the fundamental protection of the Constitution. It is of utmost importance that every citizen, civilian or soldier, be entitled to reasonable safeguards to protect him from oppression and to preserve his dignity as a citizen. The soldier receives little by way of protection under the Court Martial Law as it now exists, conceding that the fair and impartial investigation under A. W. 70 is jurisdictional. If A. W. 70 is not jurisdictional the soldier is stripped of practically all rights.

POINT II.

The investigation under A. W. 70 was not thorough.

(a) The thorough investigating officer made no investigation concerning the reputation of the complainants for chastity in the community in which they lived.

(b) Mrs. Kerry was the only disinterested witness re identity. She was not interviewed by the impartial investigator. No explanation is offered for such failure. Miriam Cullum, while walking with Mrs. Kerry, met her assailant. A conversation was carried on between the assailant, Cullum and Mrs. Kerry. They apparently walked some distance together (R. 164-165).

The defendant testified at the hearing that he requested Todd to question Mrs. Kerry and that Todd advised him

that from a defense standpoint it would be advantageous to his case if Todd did not question Mrs. Kerry.

Todd testified as follows:

"Q. At the time you were interrogating various witnesses with respect to the matter did the name of Mrs. Kerry come up?

A. Yes, the name of Mrs. Kerry did come up.

Q. Do you know what attempt, if any, was made to interrogate her and any reason why she wasn't?

A. So far as from a prosecution standpoint it was not necessary. As far as from a defense standpoint I asked Smith if he wanted her and he said 'no'."

No witness corroborates the Cullum girl's testimony at any point excepting that someone saw her crying after her alleged assault. She did not complain to the police or authorities until a week had elapsed. These facts made Mrs. Kerry's testimony of greatest importance. Prompt complaint of an assault or attack might be considered corroboration, but a complaint made a week later is no corroboration whatsoever.

(c) Todd was not thorough by failing to have a doctor look at the laceration and give an expert opinion as to whether it was a bite or a cut. A bite would cause two wounds—Smith had but one wound. He was required to make a thorough and impartial investigation. He acted as a prosecutor in determining that "her testimony was not necessary from a prosecution standpoint." He was not thorough in that if the investigation was competently made he either knew or should have known that Mrs. Kerry's testimony was of greatest importance.

"The investigation of the charge was not thorough in that it was not made competently." *(Hicks v. Hall*, 64 F. Supp. 238; *Tatham v. Hunter*, 71 F. Supp. 823.)

"The thorough and impartial investigation under A. W. 70 is jurisdictional." (*Hall v. Hall*, supra; *Anthony v. Hunter*, supra.)

(d) Todd conducted the investigation in this case solely on the affidavits presented him by the British police officer when Todd was Provost Marshall. The only important disinterested witness who could identify the assailant of Miriam Cullum was Mrs. Kerry. She was never interviewed by Todd.

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[4] An examination of the statements contained in the pre-trial investigating officer's report indicate that every complaining witness's statement was taken from the pocket book of Constable Felton who worked with Todd. The order of the statements as taken from the book is as follows:

Name of Witness	Date and Time of Statement	Page Appearing in Constable Felton's Book
Dr. Beckett	10:15 A. M. July 12	111-112
Sheila Dale	10:30 A. M. July 12	112-119
Ellen May Dale	3:30 P. M. July 12	122-125
Pamela Dale	11:00 A. M. July 13	125-129
Betty Goodall	12:15 P. M. July 13	129-130
Miriam Cullum	7:00 P. M. July 17	131-137
Frank Wolfard	7:30 P. M. July 17	138-139

Supplemental statements taken at Raydon Aerodrome by Todd and Felton in Todd's office on July 18th after the lineup:

Sheila Dale	7:45 P. M. July 18	141
Miriam Cullum	7:45 P. M. July 18	142

Todd's investigation of the People's case consisted of copying the items out of Constable Felton's notebook. The pages aforesaid are almost consecutive and cover the period in the Constable's book from 10:15 A. M. July 12, 1944, the last ones being the supplemental statements of Sheila Dale and Miriam Cullum and being taken by Todd and Felton at 7:45 P. M. on July 18th at Raydon Aerodrome.

(e) Smith claimed at Lewisburg that Todd advised him not to call Mrs. Kerry on some theory that it would be to Smith's advantage (R. 20).

Todd was a lawyer and either knew or should have known the law. He advised Smith not to call Mrs. Kerry (R. 20). He did not do anything towards investigating the Government's case subsequent to his appointment as impartial investigator.

(f) As A. W. 70 investigator he merely approved his own findings and determination made when he was acting as Provost Marshall. That determination resulted in Smith being put in jail on the afternoon of July 18th at 1600 o'clock of at 4 P. M. (R. 74). Todd certainly believed Smith guilty or he would not have arrested him.

(g) The defendant was able to produce a reputable woman from the community who testified that Sheila Dale had a bad reputation. She started to testify that Miriam Cullum was also of a bad reputation. It was ruled out on an objection (R. 229). That information certainly was available to Todd had he elected to make such an investigation. In a rape case, character and reputation of the complainants is of great importance (*Hicks v. Hiatt*, supra).

For these reasons the investigation was not thorough.

Mrs. Kerry was the ONLY Disinterested witness as to identity of the assailant. There is no explanation as to the failure of the Government or the Court to call Mrs. Kerry.

Mrs. Kerry was the only person other than the Dale and Cullum girls who saw the assailant at sufficiently close

range to identify him. Miriam Cullum testified that she was just leaving Brantham about 20 minutes to 11 on July 11th with Mrs. Kerry (R. 164). Mrs. Kerry was walking and the Cullum girl was pushing her bicycle that while so walking an American soldier came back and asked where they were going and Mrs. Kerry made some reply. He then asked if he could see them home and Mrs. Kerry said, "No, thanks." When they got to the Crown Public House "he was still walking along the side of us and asked us where we lived." Mrs. Kerry replied she lived at Brantham and they continued to walk on. When they got to a point between the two bridges "the American moved off and asked if he could see us home and Mrs. Kerry said, 'No, thanks.' Then she said goodnight to me and I got on my bicycle and at the bridge he caught me up" (R. 165). The American referred to above was the assailant of Miriam Cullum. Mrs. Kerry was the most important witness in the entire case had she been called. There is no explanation for the prosecution not producing Mrs. Kerry. When the prosecution failed the Court should have called Mrs. Kerry. The defendant according to his affidavit stated that he wanted to see Mrs. Kerry with Lt. Todd and Todd advised him not to see her; that if he was not with Mrs. Kerry the night in question that then Mrs. Kerry could testify truthfully that she had never seen the defendant before in her life. The defendant was lulled into security, believing that she would be present at the trial and the prosecution double-crossed the defendant by not producing her as a witness.

Two Constables Were Available as Witnesses.

The two special policemen who passed Mrs. Kerry, Miriam Cullum and her assailant could have testified as to the identity of the assailant. The special policemen apparently

knew the assailant in that he said "they are always after me" and the constables spoke to Miriam and her assailant (R. 171). As public officials and policemen they were readily available.

POINT III.

The examination was not impartial.

Todd first learned of the offense complained of herein when the British constable came to consult him as Provost Marshall of the Raydon Aerodrome at 11 A. M., July 18, 1944, complaining that two British girls had been molested (R. 31). That was the first time Todd knew that anything of this type had happened. The British constables and Todd questioned 8 or 9 men between 11 A. M. and 3:30 P. M. on July 18th, prior to questioning Smith (R. 200). Todd said that both he and the British police questioned Smith (R. 32). Smith testified at Lewisburg that he was questioned by Todd and the British constables for about 2 hours. Felton said to Smith: "Show me your hands." He was not advised that he was suspected of a serious offense. Felton saw a scab on the ball of the left thumb (R. 193). Smith said he was cut by a cleaver opening cans (R. 211). Todd arrested Smith and put him in jail at the conclusion of the questioning. He was jailed 1600 o'clock (R. 74). Todd said:

> "I took his commanding officer into his cell and asked Smith if he had any objection to any type of lineup and he said he had not." (R. 32).

Smith was taken out of his cell to attend the identification parade which took place about 7:15 P. M. on July 18th

(See statements of Miriam Cullum and Sheila Dale (Exs. B, B. 1, 2, 3 and 4).

At the conclusion of the identification parade Smith was returned to his cell by Todd (R. 32).

At 7:45 P. M., July 18th, after the lineup, Todd and Felton took additional statements from Miriam Cullum and Sheila Dale (Ex. B, P. 1, 2, 3 and 4.) (R. 176.). The girls were in Todd's office (R. 17 and 135); his office was in the guard house (R. 13). One girl testified she gave her statement, Exhibit B, to Todd (R. 176).

Todd was running the entire proceeding. Smith testified at Lewisburg that Capt. MacGregor sent for him and said that Todd wanted him to appear before him with Capt. MacGregor (R. 13). The questioning, according to Todd, was done by him and the British constables (R. 32). Todd testified he brought Capt. MacGregor to see Smith in jail so that MacGregor could protect Smith's rights (R. 32). All of this transpired on July 18th, prior to charges being filed.

On July 19th, after Todd had made a report, Capt. Ernest P. MacGregor signed charges alleging that Smith had violated the 92nd and 93rd Articles of war, on information and belief. Todd was the accuser in fact and his charges were adopted by Capt. MacGregor. This was a violation of army regulations (Digest of Opinions of J. A. G. of the Army, Sec. 428, Page 293; Winthrop Military Law, Vols. 1 and 2, Reprint of 1920, Pages 61, 62 and 63, Sec. 73 and 74.)

Summary.

Todd as Provost Marshall under A. W. 24 (R. 33)

(1) Had MacGregor summon Smith to be questioned; (R. 13)

(2) Questioned the British constables and thereby summoned Smith for the hearing; (R. 31, 32).

(3) Had Smith before him once before on some other difficulty wherein Smith claimed Todd had threatened him (R. 12 and 27)

(4) With the British constables questioned Smith, (R. 37) according to Smith for 2 hours; (R. 28, 29 and 30)

(5) Had Smith confined to jail after questioning; (R. 32) (He was in his cell) (R. 74) (Date of confinement 1600 hgs. or 4 P. M. 7-18-44) (R. 74)

(6) Brought MacGregor to Smith's cell to inquire with regard to the lineup to protect him; (R. 32)

(7) Arranged for the lineup; (R. 32)

(8) Took supplemental statements from Sheila Dale and Miriam Cullum, the complainant in each case; (Ex. B; P. 1, 2, 3 and 4); (R. 258, 259, 260 and first paragraph of R. 90, 91, 92 and 93) at 7:45 P. M. at Rayden Aerodrome after lineup.

(9) Had Smith returned to jail; (R. 33)

(10) All these things happened July 18, 1944, two days prior to his appointment as impartial investigator under A. W. 70; (R. 99)

(11) Based on Todd's investigation as set forth above, on July 19th MacGregor preferred the charges; (R. 74, 75 and 76)

(12) July 20th Todd was appointed impartial investigator under A. W. 70; (R. 29)

(13) TODD AT THE TIME OF THE APPOINTMENT HAD HAD SMITH IN JAIL FOR TWO DAYS.

(14) As a matter of law he could not be impartial.

The Impartial Investigation by Todd Was a Farce.

No witness was called at the impartial investigation who added anything to the statements which were taken by Todd prior to his appointment as impartial investigator (See pre-trial investigating officer's report; Ex. A, P. 1, 2, 3 and 4; Exhibit B, P. 2, 3, 4, 5 and 6 and Ex. C.)

Todd's impartial investigation consisted of going through certain motions to comply with A. W. 70. On July 24th, the date he filed that report, the only additional facts that he had acquired were: Pvt. William Vandergrift saw Sheila Dale crying at her home (Ex. A, P. 3) at about a quarter to 12. The following statements were taken from the following persons on the following days:

Frank Albert Welham	July 17, 1944
Pamela Joy Dale	July 13, 1944
Ellen May Dale	July 12, 1944
Frederick Harry Eli Beckett	July 12, 1944
Betty Goodall	July 13, 1944
Wilfred John Felton	

(These affidavits were taken by Constable Felton and turned over to Provost Marshall Todd on July 18th. He later put them in his A. W. 70 report.)

At the time Constable Felton first consulted with Todd on July 18th he had all those statements in his book at Pages 111 to 139 (Ex. B, 1, 2, 3, 4, 5 and 6). After the lineup Todd and Felton took supplemental statement at pages 141-142 of Felton's book and presumably turned them over to Todd. Todd did not learn any single fact concerning this case after his appointment under A. W. 70 that he did not have in writing on July 18th, two days prior to his appointment.

POINT IV.

The Government has changed its theory in this case.

At the hearing at Lewisburg, Smith contended that the identification lineup was conducted by Todd on the evening of July 18th, four hours after he was first quizzed by Todd. Todd claimed that the lineup took place a week after July 18th, when he was acting as investigator under A. W. 70. The attorney for Smith requested in open court the date of the appointment of Todd as A. W. 70 investigator, and it was missing from the government record (R. 36-37).

Counsel for Smith discovered the appointment while examining the record on the day of argument in the Court of Appeals, April 8, 1948. Todd was appointed investigator under A. W. 70 on July 20th, two days after the lineup was conducted and two days after he took the last statement of the two complainants. The Government now admits substantially all of the defendant's contentions excepting they deny that Todd assisted or participated in the taking of the statements on July 18th at 7:45 after the lineup.

POINT V.

The statements were taken by Todd and Felton on July 18 at 7:45 P. M. at Raydon Aerodrome.

Judge McLaughlin in the court below commented concerning Todd's taking of the statements (Ex. B). The Government in its brief (P. 15, footnote 7) said that Judge McLaughlin was mistaken. *Judge McLaughlin was not mistaken.* The facts are Exhibit B, P. 1, 2, 3 and 4, is a statement of Miriam Collum[1] and a statement of Sheila Dale. From examining the photostatic copies of the statements it is clear that both statements were typewritten at the same time. The last paragraph of each statement states "at 7:15 P. M. on Tuesday 18 July 1944 I attended an identification parade at the Raydon Aerodrome * * *." Their signatures appear after that statement. After the signature appears:

> "Original statement taken at 7 o'clock July 17, 1944 at 57 Colchester Road and at 7:45 P. M. on July 18, 1944 at Raydon Aerodrome."

The Government admits that immediately following the identification parade each girl gave Felton another statement (P. 6 of brief), but denies Todd was present. The question is: Did Todd participate in taking the statements?

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[1] The record in connection with this citation is garbled—see stipulation. The statement proper appears at 258, 259 and 260. The balance of that statement is contained at Page 90, containing that matter preceding and not including the words "Statement of Frank Albert Welham."

The two girl complainants were brought to Raydon Aerodrome for the identification parade. Constable Felton testified that Miriam Culliton was in Lt. Todd's office at the time Sheila Dale was at the identification parade (R. 195); that Miriam Culliton went back to Lt. Todd's office when Sheila Dale came out to attend the identification parade (R. 195). At the trial one of the girl complainants *testified she gave the statement, Exhibit B, to Lt. Todd on July 18th.* This statement was marked "Exhibit B" (R. 176), and Judge McLaughlin in his opinion commented thereon at R. 278:

> "Exhibit B for the defense referred to at the trial as 'statement of Sheila Dale to Lt. Todd' appears to be a record of such interview * * *." (R. 278)

Exhibit B was taken in part at 7:45 P. M. on July 18th in Todd's office at Raydon Aerodrome. Smith testified at Lewisburg that the girls were in Todd's office prior to the lineup (R. 176) and that the windows on Todd's office faced in the direction where the lineup was being conducted. Todd's office was in the guard house (R. 13). Both girls were in Todd's office immediately prior to the lineup and returned there thereafter. Todd conducted the lineup (R. 32) and Felton was also present and so testified (R. 195). It definitely appears and is nowhere disputed that the girls were brought to Todd's office at the Raydon Aerodrome for the purpose of attending the lineup. Each separately viewed the men in the lineup and returned to Todd's office (R. 195). Smith was originally interrogated in Todd's office by Todd and Constable Felton. Todd said he was conducting an A. W. 70 investigation (R. 33). They now allege that Todd's signature appears on the girls' statements by reason of certifying same at the A. W. 70 investigation, and that he did not participate in the taking of the

statements or was even present when they were taken. This is a new claim by the Government. The Court below, in its opinion, noted that the Government raised no issue in this matter (R. 279). Todd did participate in the taking of the statements and the conducting of the lineup and the general investigation under A. W. 24 (R. 33).

Todd testified and the Government argued that Todd conducted the lineup and all pertinent phases of the investigation as A. W. 70 investigator a week later. The defendant denied this fact and has conclusively proved that such was false. The Government now admits that Todd was in error (Footnote 9 of brief). Todd himself said he was conducting this investigation under A. W. 24 (R. 33). The Government now urges that in the course of his conducting the identification lineup with the British constables the girls were held in Todd's office and statements were taken by Felton, but that Todd simply didn't know about it. This is false. The Government suggests that Todd was as lax in his A. W. 24 investigation as he was in the A. W. 70 investigation later.

POINT VI.

Todd was acting as the accuser and Provost Marshall at all times in this proceeding.

All witnesses at the trial, and every person who made a written statement, stated the lineup was July 18th at about 7:30 to 7:45 P. M. No witnesses disputed the time. At Lewisburg Todd told how he arranged the lineup (R. 32-33). Concerning his actions immediately after the lineup he testified as follows:

Q. Subsequently was Smith brought into the PX [illegible] Marshall's office?

A. Smith was taken to his cell and his captain went [illegible] and I asked Smith if he thought the line-up was conducted in a fair manner, and he said it was but still protested his innocence. At no time did I threaten Smith and tell him that he had to answer questions or his right to get into the lineup or I would bring the girls into the cell. *I was acting under the 24th Article of War.*" (R. 33)

The 24th Article of War provides as follows:

"ART. 24. *Compulsory Self-Incrimination Prohibited.* No witness before a military court, commission, board of inquiry, or board, or before any officer conducting an investigation, or before any officer, military or civil, designated to take a deposition to be read in evidence before a military court, commission, court of inquiry, or board, *or before an officer conducting an investigation*, shall be compelled to incriminate himself or to answer any question the answer to which may tend to incriminate him, or to answer any question not material to the issue when such answer might tend to incriminate or degrade him." (Emphasis supplied)

Todd, the [illegible] admitted he was conducting an investigation. His duty was to conduct the investigation so that [illegible] Provost Marshall. Todd was appointed [illegible] investigator under A. W. 70 July 20th. The charges were filed July 30th. He could not have been appointed [illegible] investigator prior to the filing of the charges. See, 70, A. W. Todd, therefore admitted by implication that he was the accuser in fact and the [illegible] investigator provided by law under A. W. 70 was a farce.

Todd having conducted the inquisition under A. W. 24 stated:

"Q. Prior to the time of your having been appointed investigating officer under A. W. 70 had you formed any opinion in your mind as to the guilt or innocence of the accused?

A. I had not. I was of a perfectly fair mind. When I was appointed investigating officer I wanted to get at the truth of the matter." (R. 33)

At that time Todd had arrested Smith and locked him up for two days in jail.

The foregoing question and answer is so apparently erroneous or false it is unnecessary to discuss the same.

Concerning Todd's explanation of the absence of Mrs. Kerry, the impartial witness, he stated as follows:

"So far as from a prosecution standpoint it was not necessary. As far as from a defense standpoint I asked Smith if he wanted her and he said 'no.'." (R. 35)

Todd by that answer admitted that he was judging the case from the prosecution standpoint and Smith apparently was conducting his own defense. At one point he called in Capt. MacGregor to protect the defendant (R. 32).

A. W. 70 Investigation by an Accuser is Illegal.

"The course of administration involving action by one and the same officer as accuser and investigating officer in the same proceeding met with the disapproval of the Secretary of War." (Digest of Opinions of the J. A. G. 1912-1940, P. 293, Sec. 428.)

"Investigation by Accuser. Several records of trial by general court-martial received in the office of the Judge Advocate General indicated that some confusion

existed in the service as to the requirements of A. W. 70 regarding the 'thorough and impartial investigation' of charges. The validity of the sentence in each of the cases covered by those records was brought into question by reason of the fact that the investigation conducted under the second paragraph of A. W. 70 has been made by the officer signing the charges under the oath prescribed by the first paragraph of that article. The course of administration thus disclosed, involving action by one and the same officer as accuser and as investigating officer in the same proceeding, met with the disapproval of the Secretary of War.,

Accordingly, under date of January 15, 1929, instructions were communicated, by order of the Secretary of War, to each officer exercising general court-martial jurisdiction, directing that steps be taken to make certain that the investigation required by the second paragraph of A. W. 70 be made by an officer other than the signer of the charge under investigation. '250.45, Jan. 10, 1929.'" (Digest of Opinions of the Judge Advocate General of the Army, Section 428 at Page 293.)

Todd Was the Accuser in Fact.

Construction of terms "Accuser" and "Prosecutor":

"as indicated by the use of the disjunctive 'or' these terms are evidently intended to bear a somewhat different signification. To distinguish therefore the two designations *'accuser is construed to mean either one who originates the charge or adopts and becomes responsible for it;* 'prosecutor' one who proposes or undertakes to have it tried and proved * * * * * * where having personally originated or adopted the charges, he has preferred them as his own, or

caused them to be preferred accordingly by another person with the purpose of having them brought to trial he is in general properly the 'accuser' even if he may occupy no hostile or adverse position towards the accused. So, if influenced by hostile feeling, or by a conviction that the accused is guilty and that his offense demands to be promptly and efficiently dealt with, *he proposes upon assembling the court actively to promote the prosecution, as by instructing the judge advocate facilitating the attendance of witnesses for the prosecution, appearing himself as a prosecuting witness, &c., he is properly to be deemed a 'prosecutor' within the meaning of this article,* and it will not be legal for him to order the court, but the president must be resorted to for the purpose." (Winthrop's Military Law and Precedents, Vols 1 and 2, Reprint of 1920, Pages 61, 62 and 63, Sections 73 and 74.) (Emphasis supplied.)

POINT VII.

U. S. District Judge Follmer's decision was predicated on an erroneous statement of fact by the Government.

The Government at Lewisburg advised the Court that they could not find the date of Todd's appointment as impartial investigator under A. W. 70 (R. 36, 37). Judge Follmer decided this case without knowing the true date Todd was appointed impartial investigator. Counsel for the defendant in Philadelphia just prior to argument of this case on April 8, 1948, found Todd's appointment as impartial investigator at Page 54 of the photostatic record

(R. 99) as filed with the Clerk of the Court of Appeals. The date of this appointment was of utmost importance. Todd was wrong and the Government now admits the error. Todd actually made all of pertinent investigation under A. W. 24 and prior to his appointment under A. W. 70. The Government relied on the erroneous testimony of Todd and the Judge accepted same. When the true facts appeared the Judge had already made his decision based on a fact which was false.

Had Judge Follmer been given the true date of the appointment it would have changed the entire law of the case and undoubtedly changed his decision.

The defendant requested the Government to provide a photostatic copy of every paper in the file. This request was denied by the Government on the ground that such information was confidential. At the Lewisburg hearing counsel for the defendant requested the date of the appointment in open court (R. 99) and he was advised that the date of such appointment was not in the file.

POINT VIII.

A. W. 70 was not substantially complied with in the case at bar.

Judge McLaughlin in his opinion stated:

> "In the present matter we are not faced by some necessary informality of investigation but by the lack of its two essentials, thoroughness and impartiality." (R. 282)

Concerning the impartial investigator, Todd:

> "The government asserts that, as he testified at the

habeas corpus hearing. Todd had a completely open mind and was seeking only the facts. Unfortunately, as his testimony clearly shows, he considered the full facts ultimately. He was asked why he had not examined Mrs. Kerns, the only person actually named in the investigation outside of the complaining witnesses, who had seen the offending soldier closely. He answered: "So far as from a prosecution standpoint it was not necessary. As far as from a defense standpoint I asked Smith if he wanted her and he said "no".' Such reply cannot be said to account satisfactorily for the elimination, without at least reasonable inquiry, of this vital witness. Todd's attitude, as he himself explains it, is interesting. Under A. W. 70 and in common fairness to Smith, the investigation had to be thorough and impartial. Its purpose was not only to present the prosecution with a case that would support conviction but to put before the court-martial authority at least a substantial picture of what happened, based on all essential evidence. This was not done." (R. 280)

Judge McLaughlin digests the facts in this case in a most thorough and complete manner. The opinion of the court below is an important argument on the facts and law for the respondent.

POINT IX.

There was no corroboration of either girl's testimony.

1. Sheila Dale made an outcry when she got home. This is not corroboration. The fact she did something when she got home means no more than as if she said it in court. She cannot corroborate herself.

2. The record discloses that Constable Felton found some grass tread down. There is no testimony in the record that anyone pointed the place out to him (R. 192). No foundation was laid for that testimony.

3. Betty Goodall testified she heard a scream about 10:30 and there was no fright in it (R. 189). It just sounded ordinary.

4. The complainant testified her glasses were not knocked off. (R. 137)

5. The doctor said she was not a virgin. (R. 153)

6. There were no marks about her privates indicating that she had had intercourse with anyone and of course no evidence of rape. (R. 155, 156 and 157).

7. She went to Dr. Beckett. "She came complaining that she had been raped by a man and no contraceptives had been used and she was worried about it in case she became pregnant" (R. 154). She made no complaint to the police from 12 o'clock that night until she came to the doctor about 10 o'clock the next morning. Then the doctor called the police. (R. 152)

8. The doctor testified he could not say she was raped. (R. 156).

The doctor said, "I treat a person who has had a rape[illegible] (R. 367). She had some bruises on her [illegible] (R. 367).

7. She [illegible] (R. 124). He dragged her [illegible] (R. 125). She started to scream and when he said to stop or he would kill her she stopped. He took her knickers off (R. 124). He inserted his penis (R. 125) without any assistance from her. She said he was on her 4 or 5 minutes. During that period of time she evidently cooperated with him. At 11:45 he gave her her knickers and she put them on (R. 126). They kissed and made a date for the following Thursday (R. 126) and then she went home. She arrived there at 12 o'clock (R. 126).

10. At the time she started for home she began to plan to claim she was raped for the purpose of preserving her appearance. Her attitude in mind at that time squared with the theory of Patthammer on Rape in the Illinois Law Review (cited).

11. During the rape her glasses were not knocked off (R. 137). Her knickers were removed without any ripping or tearing (R. 138). The intercourse was of an unusual duration (4 or 5 minutes). She didn't scratch him. She didn't attack him. She said if she kicked him in the crotch she might hurt him. (R. 142)

12. The police were not called that night or the next day. In fact the police were never called by her or her family who knew the story and she went to the doctor's for the purpose of finding out if she was pregnant. At the trial

evidence was adduced to indicate she was of bad moral character.

From the foregoing:

(a) There is no credible evidence of rape.

(b) There is no corroboration.

(c) The identification rests solely on Sheila Dale.

(d) The alibi is substantiated by 6 or 7 American soldiers.

(e) The cut on Smith's hand meant nothing in Sheila Dale's case.

POINT X.

There is serious question as to whether a rape in fact occurred on Shiela Dale.

She didn't report it to the authorities until she was being examined by a physician the next day to ascertain whether or not she was pregnant. Then the physician reported it to the authorities. The physician stated that she was not a virgin and that he could not testify that she had intercourse recently. She was not bruised inside and she only had three bruises on her body—one on her right thigh, her left knee and left arm, which could have been caused by the bicycle fall (R. 178). There were no marks about her neck although she testified that he put his hands on her throat and told her if she didn't stop screaming he would murder her (R. 124). Her glasses were not knocked off and she said she struggled with him (R. 137). She didn't put up much of a fight. She said she kicked and struggled but the

only thing she apparently accomplished was that she kicked off her knickers (R. 138). She didn't kick him in the groin because she thought it might injure him (R. 142). She said he was hurting her although she seemed to know that he did not put on any contraceptive (R. 142).

In fact, the examining physician testified:

> "Q. When this girl came to you did she come with a view to getting this 'prostigmine' test for pregnancy?
>
> A. No. She came claiming she had been raped by a man and no contraceptives were used and she was worried about it in case she were pregnant." (R. 154).

Dr. Davidson testified there was semen on her knickers but there is no evidence as to where the semen came from and there is no evidence indicating whether or not she had relations with the boy she was out with previously that evening—"Kentucky" (R. 149). She was not even asked the question. Under the circumstances there is grave doubt as to whether or not she was actually ravished, considering her reputation in the community, her perfunctory defense and her failure to report the matter to the police; although she might have had intercourse that evening. Had the doctor not called the police for the purpose of protecting himself the matter probably would never have been reported to the authorities. There was ample time between midnight and 10 o'clock the next morning to call the police before she went to the physician to ascertain whether or not she was pregnant.

Betty Goodall testified she heard a scream about 11 o'clock which was "ordinary", and there was "no fright in it" (R. 190). This was about a half hour before Sheila Dale was assaulted.

> "Mere verbal protestations and a pretense of re-

sistance are not sufficient to show want of consent, and where a woman fails to take such measures to frustrate the execution of a man's design as she is able to and are called for by the circumstances, the inference may be drawn that she did in fact consent.

It has been said of this offense that 'it is true that rape is a most detestable crime' * * *; but it must be remembered that it is an accusation easy to be made, hard to be proved, but harder to be defended by the party accused, though innocent'." (149 b MCM P. 165.)

The law of England provides as follows:

"In cases of rape and other sexual offenses against women, girls and boys, the jury may convict on the uncorroborated evidence of the prosecutrix or prosecutor but the judge should warn them that it is dangerous to do so.

The Court of Criminal Appeal may quash a conviction in the absence of an adequate warning (k) or if the evidence which is referred to by the judge as corroboration is not corroboration (l) or is doubtful.

Evidence of a complaint made by a prosecutrix or prosecutor is not corroboration of her or his evidence since it lacks the essential quality of coming from an independent quarter."

(*Halsbury's Laws of England, Criminal Law & Procedure*, 2nd Edition, Vol. LX, Part VI, Sec. 314.)

"No conviction can be had for rape or defilement upon the testimony of the female defiled, unsupported

by other evidence." (*Penal Law of New York*, Sec. 2013.)

"If the commission of a sexual act becomes known the prosecutrix is impelled by many motives of self-interest to assert that it was done criminally. She has every selfish inducement to bring about a conviction, as every ground of acquittal, except possibly mistaken identity, would involve a reflection on her." (*Puttkammer, Consent in Rape* (1925) 19 Ill. L. Rev. 410, 421.)

In *State of New York, Law Revision Commission Report, Recommendations and Studies*, 1937, Page 473, it is stated:

"The courts have always been cautious in dealing with these crimes and have been very reluctant to uphold convictions resting wholly upon the testimony of the prosecutrix. At an early date Sir Matthew Hale warned against the danger of such convictions and observed:

" * * * it must be remembered that it is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, though ever so innocent; * * *"

and that we should:

"be more cautious upon trial of offenses of this nature, wherein the court and jury may with so much ease be imposed upon without great care and vigilance; the heinousness of the offense many times transporting the judge and jury with so much indignation that they are over-hastily carried to the conviction of the person accused thereof by the confident

testimony, sometimes of malicious and false witnesses.". (1 Hale, P. C. 635-636.)

Judge Cowan, writing for the Court of Appeals for the State of New York in *People v. Abbot*, 19 Wen 192, stated:

"Any fact tending to the inference that there was not the utmost reluctance and the utmost resistance is always received. A mixed case will not do. The connection must be absolutely against her will. The People v. Morrison, 1 Parker Criminal Report 625, the Court stated: 'The prosecutrix, if she was the weaker party, was bound to resist to the utmost. Nature had given her hands and feet with which she could kick and strike, teeth to bite and a voice to cry out; all of these should have been put in requisition in defense of her chastity.' It therefore follows that a passive or perfunctory resistance is not enough. Her resistance had to be active in proportion to the outrage. People v. Carey, 223 N. Y. 549."

In *People v. Dohring*, 59 N. Y. 374, Page 383:

"Of course the phrase 'the utmost resistance' is a relative one and the resistance may be more violent and prolonged by one woman than another or in one set of attending physical circumstances than in another, but whatever the circumstances may be there must be the greatest effort of which she is capable therein to foil the pursuer and preserve the sanctity of her person. If she is conscious of what is attempted and has the possession of natural mental and physical powers in usual degree, and is not overawed by the number of assailants, nor terrified by threats of death or the like, nor in such place and in such position as that re-

sistance is useless. She must resist until exhausted or overpowered for a jury to find that it is against her will."

THERE WAS INSUFFICIENT EVIDENCE TO SUSTAIN A CONVICTION IN THE CASE OF MIRIAM CULLUM.

She did not make a complaint to the police until a week had elapsed. At that time even Constable Felton did not attach much significance to her claim until the "actual words" were added to her original version. At first she did not mention the "actual words" (R. 197). Someone either refreshed her recollection or suggested that her complaint would somehow aid Sheila Dale's case. At the time the complaint was made (July 16th, five days after the assault R. 197), she told Constable Felton she bit her assailant. On the following day the Constable went to Raydon Aerodrome, and, as set forth hereinbefore, examined the hands of the eight or nine soldiers brought before him by Lt. Todd for examination. She said unequivocally that she bit the right hand (R. 259) of the defendant. Constable Felton effected his identifications by means of the scab on the defendant's *left hand* (R. 193). At no point in her testimony did she describe the severity with which she bit her assailant. No mention is made as to whether or not blood was drawn. In the Raydon Aerodrome there must have been available physicians who could have easily noted the distinction between a bite, which is in fact a pinch or a squeeze which would leave the imprints of the upper and lower teeth, and the laceration which was on the defendant's left hand and which was caused by a cleaver. This was a very important factor. From reading the testimony the Court must take judicial notice that the entire case

hinged on the identification via the cut on the hand. The Government, rather than call a physician, relied on the lay testimony of Constable Felton that the cut on the defendant's hand could not have been made with a knife or cleaver. He made no examination of the teeth or appearance of the defendant as suggested by the complainants (R. 199) but merely relied on the cut on the hand. At that time Smith advised the Constable that he had suffered the laceration from a cleaver (R. 199).

Sgt. Pelletier testified that he was present on Thursday at around 9:30 when Smith came to him with a cut on his hand; that at the time Smith said he got it while opening cans with a cleaver. He didn't actually see the accident but he knew what Smith was doing. He saw the blood running. He was his Chief Cook and superior officer (R. 227), and Sgt. Pelletier dressed the cut for him (R. 229). Sgt. Pelletier stated that in opening cans with a cleaver a person was likely to get cut most anywhere (R. 230). A physician might have determined on July 18th not only whether the cut was from a cleaver or a bite, but he also might have been able to tell from the nature of the wound by examination as to whether or not it was five days or seven days old. This evidence in and of itself was sufficient to constitute a reasonable doubt as a matter of law.

The Court fell into error in combining the testimony of Sheila Dale and Miriam Cullum in such a manner so as to determine that the defendant was guilty in both cases, whereas in fact when the cases are severed and analyzed separately there is insufficient evidence in either case to warrant a conviction.

POINT XI.

The relator conclusively proved he was in the Raydon Aerodrome at the time the alleged offense occurred.

Time was of greatest importance in establishing the defendant's alibi. Dale testified she left her assailant at 11:45; that she got home at 12 o'clock, about 5 minutes after she left her assailant (R. 144). In that she was corroborated by her sister, Pamela Dale (R. 158) and Pvt. Vandergrift (R. 162). In her statement, Exhibit B, Page 3, she said she got indoors just after 12 o'clock. Her mother said she got home just after 12 o'clock (Exhibit B, Page 5). She said it was dark enough so that she couldn't ride her bicycle without lights (R. 120); that it was getting pretty dark (R. 133). It took her 5 minutes to get home. Sunset was 10:19 British War Time. Twilight ended and full darkness began 50 minutes later, or 11:10 P. M. (Nautical Almanac for 1944 and British Meteorological Glossary, 3rd Ed.)

Court's Exhibit 1, the official passbook (R. 258), indicated the defendant entered camp at 23 o'clock, which was the nearest hour to the time the defendant entered camp (R. 247). That book was kept to record the time the men check in (R. 248).

Defendant met Pvt. Andy Partyka, who was evidently a little intoxicated, and rode into camp with him without stopping, at about 11:30 (R. 219-220).

Harrison Wakeley, government witness, sentry at the gate, saw the defendant enter the camp about 11:45. He was relieved from duty that night at 11:50 and he said it

could have been a half hour before he left his post that Smith entered the camp (R. 203). That would be about 11:20. The sentry had a duty to ascertain to observe what was going on, to allow no one to pass without proper authority and to represent the commanding officer. (Basic Field Manual 193-194.). The government having called this witness and vouched for his credibility, and which witness had the duty of observing what was going on, should be bound by his testimony. If the government doubted his credibility or accuracy they could have called the sentry who succeeded Wakeley on duty to ascertain as to whether or not Wakeley actually went off duty that night at 11:50. Shiela Dale and all of said complainant's witnesses were specific in stating that she got home at 12 o'clock and that it took 5 minutes to get from the scene of the offense to her home. If Wakeley actually saw the defendant entering camp some time prior to 10 minutes to 12, and considering it was five miles' travel up hill from the scene of the offense to the camp, the defendant could not have been the assailant.

Sgt. Pelletier was Smith's superior officer. He saw Smith shortly after the A.F.N. news bulletin, a U. S. government radio hookup in England. He saw the defendant enter shortly after 11 o'clock (R. 225, 226). "I recall the A.F.N. news and about 15 minutes later the B.B.C. came on (R. 228). The A.F.N. news ended some time between 11 and 11:15 (R. 228), and the defendant came to the Sergeant's room less than 10 minutes after the A.F.N. went off the air (R. 226). The defendant requested the Court to take judicial notice the A.F.N. went off the air at 11:05 every night, which was refused. The T.J.A. refused to stipulate this fact although said information was readily available. The T.J.A.'s duties required him not to suppress any evidence

favorable to the defense and act inconsistent with a general desire to have the whole truth revealed (M.C.M. 41-d). The Court ordinarily should have taken appropriate action with a view to obtaining such additional evidence as was necessary for such determination (M.C.M. Sec. 56, Page 58).

"The defendant was entitled to be tried fairly." (*Hicks v. Hiatt*, supra.)

1st Sgt. Robert H. Hayes testified he saw the defendant at 11:30 to 11:45 in the kitchen mess hall (R. 231). He was positive as to his information (R. 232).

S/Sgt. Edward R. LaPage said he saw the defendant in the mess hall between 11:15 and 11:30 (R. 233).

Sgt. Stanley T. Pleban saw Smith about 11:30 (R. 237).

The defendant was relying on an alibi. The complainants testified that he committed certain actions at a certain time. He conclusively demonstrated that he was not there at the time alleged. The reviewing authorities have indicated that the girls might have been mistaken concerning the time. If so, the testimony concerning the darkness as taken from the official almanac is strong supporting evidence of the defendant's alibi.

Sheila Dale was characterized over the objection of the government as a girl of bad reputation as to chastity (R. 238). Her testimony was accepted and the six soldiers' testimony was rejected. "The government accepted every statement made by Sheila Dale as being the absolute truth with the exception of her statement as to the time of the occurrence of the attack. On this they feel that she might be in error. That was the only subject which the defendant was able to attack. Having successfully controverted and

defeated this issue of time the government indicates that the time really was not of much consequence when, as a matter of fact, it was of tremendous importance.

The District Court Gave Great Weight to Partyka's Testimony.

In riding home with Partyka, Smith is alleged to have said that he had a girl that night. This is not evidence of the commission of a crime nor in fact any evidence at all. Yet the Court accepted that evidence and the District Court quoted the same although all other portions of Partyka's testimony even when corroborated by the sentry at the gate and soldiers in camp was disregarded.

POINT XII.

The Government theory of the law in the case was erroneous.

The Government case started on the premise that the same person committed both crimes. Both cases were tried together with the same witnesses although there were two separate and distinct offenses, each one of which had to stand on its own facts. The evidence was intermingled to the point that the evidence was construed by the Court as cumulative and mutually corroborative. This was error. (Review J.A.G., P. 9 and 10.)

Lt. Todd, as Provost Marshall, having convinced himself that the defendant was guilty and caused him to be committed to the guard house, made a report to his commanding officer concerning his findings. Of all the officers in the U. S. Army, only Lt. Todd was disqualified from being an

impartial investigator. Todd admitted he had a dispute with Smith a short time previously (R. 31). The impartial investigation was a matter of right, not a matter of convenience. Lt. Todd really made his investigation first as Provost Marshall, then using the same documents, papers and witnesses, made his report as impartial investigator.

(*Digest of Opinions of the J.A.G.*, supra;
Winthrop's Military Law and Precedents, supra.)

Errors Made by the Reviewing Authorities.

Review of Staff Judge Advocate dated September 19, 1944. The first 3½ pages of this report are just a summary of the testimony of the two girl complainants. The reviewing authority did not miss any fact that would support the People's case. The testimony of 6 soldiers, including the sentry at the gate, was disposed of in 37 lines. "The record fully justifies the inference that she did not in fact consent" (R. 68). This statement is contrary to the evidence (Exhibit B. Pages 2, 3 and 4).

The record indicates that she did consent. She was not bruised or injured nor were her glasses knocked off.

The reviewing authorities attach great significance, as did Constable Felton and Lt. Todd, to the cut on the defendant's hand.

"There is also corroborative circumstances of the scab from an incised wound on the accused's left hand at the spot where Miriam Cullum testified she bit him" (R. 69).

The accused explained this scab as resulting from a cut with a cleaver, but the Constable who examined it stated

the scab was from an incised wound rather than an abrasion or a cut. The word "incised" was used by the Trial Judge Advocate and Constable Felton. There was never any mention of an abrasion. An incised wound is precisely the type of wound that would be caused by a cleaver. Webster's New International Dictionary defines "incised" as "to cut in or into with a sharp instrument, to carve, to engrave." That type of wound could not come from a bite with teeth. They also neglected the fact that she testified she bit his *right hand*, whereas the cut was on the *left hand*.

The defendant attempted to offer the scar of the wound in evidence at the Lewisburg hearing on the habeas corpus and the Trial Judge without examining the scar determined that it was not important and inadmissible. At the time of the hearing the scar could be seen as that of a straight line and a continuous cut.

"The fact the attacks took place at the same place" (R. 69) was incompetent evidence and no proof against the defendant. The only emphasized point and underlined word in the entire review is the statement wherein Partyka, who was treated lightly, (the inference being that he was intoxicated at the time) stated that the defendant said he was with a girl that evening.

> "* * * after he reached the station that he was deliberately attempting to establish an alibi. In this connection it is to be noted that the accused testified he spoke to 'all' the men in the mess hall that night and although his memory before 12 o'clock was exact he testified 'there was no reason to remember the time after 12'." (R. 70) Review of Staff J. A.

The defendant was charged with two crimes which occurred between 10:45 and 11:45. He prepared his case on

those grounds. He might not have been able to advise the Court as to where he was at any other given time but as to the time of the alleged crime he made a detailed examination and preparation for the purpose of preparing his alibi. If it were necessary for him to establish where he was on any other occasions he should have been given the opportunity to prepare his defense.

"The accused's conduct with respect to the cut on his hand two days later also suggests the purpose of establishing an alibi" (R. 70).

In that the reviewer is correct. An alibi if established is a complete and total defense. If he could prove he wasn't there and if he could further prove that the essence of the prosecution's case, to wit: the lacerated hand, did not come from the bite of Miriam Cullum, he should have been acquitted. However, the reviewer construes this undisputed testimony of Sgt. Pelletier and the defendant as being false merely because it conflicts with a desire to find the defendant guilty. The Sergeant testified he saw fresh blood running from the defendant's hand and dressed the wound. No proof could be much more effective if it were true. Pelletier's credibility was not attacked.

The Review of the Branch Office of the Judge Advocate General dated December 9, 1944.

"Tall weeds had been broken down as if some person had been lying there". (R. 51).

There is no evidence in the case anywhere connecting up this evidence. This evidence was not binding on the defendant. Neither girl points out this spot to Constable Felton according to the testimony in the case. It was not evidence and utterly irrelevant, immaterial and highly prejudicial.

"The time element in the two crimes complement each other and are in harmony:"

This is no evidence against the defendant. This is one of the fundamental errors of the case. All prosecuting authorities construed both cases together, whereas each case had to rest on its own foundation. Perhaps the same man did commit both offenses. The defendant contends it was not he.

"The description given by Miriam of her assailant closely corresponds with the description given by Sheila" (R. 52).

These descriptions are of no value. Miriam Cullum identified the defendant as wearing an American uniform, riding a khaki colored bicycle and as the man who sat in the court room. The fact he was an American, wearing no stripes and riding a khaki colored bicycle could be any enlisted man in the army.

The J. A. G. Review stated: "Miriam bit her assailant on one of his hands" (R. 53). Miriam's statement said "right hand" (R. 259). The wound was, in fact, on the left hand (R. 193, 199-211). R. 176, referred to by the reviewer, was where they cross-examined Miriam as to the contradiction between her statement which said "right hand" and the fact, which was the left hand.

The J. A. G. erred in not appreciating the significance of Miriam's error. She bit a man on the right hand and because a man had a wound on his left hand he was convicted.

"The evidence is substantial and convincing that the same white American soldier committed the two crimes" (R. 51).

The reviewing authorities have arrived at the above presumption by circumstantial evidence, they then erroneously concluded the fact that if the defendant was the assailant he committed both crimes. This was error. (*U. S. v. Ross*, 92 U. S. 281, 283.) Therefore, as a matter of law, the Judge Advocate General's Office made a reversible error in the Review.

The Identification Parade Was Improperly Conducted.

Smith testified the C.I.D. man asked him if he wanted to change his position in line.

> "Before he had completed talking to me the other girl was brought out" (R. 216).

The second girl was brought out while the C.I.D. man was actually talking to Smith (R. 216). Smith testified Miriam Cullum was practically forced to go down to look at the men and she had her head half covered up. He said Sheila Dale walked down the line and had hysterics or something and one of the officers or C.I.D. men walked over to Smith and then Sheila Dale put her hand on him. He was not asked to show his teeth and Smith's hands were behind his back (R. 216). Constable Felton corroborates Smith as follows:

> "Q. What, if anything, did you see the person known as Sheila Dale do at the time the identity parade was held?
>
> A. I walked with her along the road and she picked out the man who assaulted * * *" (R. 194).

There is no contradiction of Smith's testimony in the record. Smith filed an affidavit with the District Court wherein he stated that the Dale and Cullum girls were kept in

Todd's office prior to the lineup and that they could see the scene of the lineup through a window. Constable Felton answered this accusation as follows:

"Q. Do you know whether or not from the office of Lt. Todd anyone could see the soldiers lined up in the parade?

A. No, sir, they could not.

Q. How do you know?

A. You can't see out the windows, *not at the bottom*" (R. 195).

The windows were hung in such a manner that they hinged from the bottom and Smith claimed in his affidavit that the girls could see the lineup over the top of the window.

The integrity and fairness of the lineup in view of Smith's accusations and the government's failure to refute or even deny the same is open to question. The defendant's affidavit contends that Constable Felton was alone with the two girls in Todd's office prior to the lineup, the inference being that Felton described the defendant to the girls.

POINT XIII.

The provisions of the Manual of Courts-Martial were violated to the prejudice of the defendant.

The defendant was ordered by his commanding officer, Capt. MacGregor, to report to him. The defendant inquired of Capt. MacGregor, the purpose of the summons and MacGregor replied: "Lt. Todd wants to see you. I don't know what he wants." Thereupon MacGregor es-

sorted Smith to Todd's office. At Todd's office he was quizzed for three hours by Felton and Lt. Todd in Capt. MacGregor's presence. At one time during the quiz, the defendant refused to answer and the defendant turned to Capt. MacGregor and said "Captain, am I required to answer these questions?" The Captain nodded to Lt. Todd and indicated that the defendant should do as directed by Lt. Todd. Todd then told him to answer the questions as propounded by Felton or go to jail. "Command of a superior officer is presumed to be a lawful command." (Sec. 134-b, 64th A. W.) The punishment for wilfully disobeying of a superior officer is: "1. Suffer death or such other punishment as a court martial may direct." (Article 64.) The defendant was not in a position to argue with his superiors.

Capt. MacGregor swore to the charges on information and belief (R. 117). He stated he had investigated the charges, but as a matter of fact the charges had been investigated by Lt. Todd and adopted by Capt. MacGregor.

> "An accuser or a prosecutor could not be a member of a court martial" (A. W. 8).

By the same reasoning an investigator of the charges can not be the impartial investigator pursuant to Sec. 35, M.C.M., wherein he is directed to investigate the "truth of the matters set forth in the charges, form of charges and what disposition of the case should be made in the interest of justice and discipline."

POINT XIV.

The application for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1948

No. 457

GEORGE W. HUMPHREY, Warden, United States Penitentiary, Lewisburg, Pennsylvania,

Petitioner,

—*v.*—

BERNARD W. SMITH,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENT.

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Williams v. Kaiser, 323 U. S. 476-477; 89 L. Ed., 65 S. Ct. 363 48

Statutes Cited:

Halsey's Law of England, Criminal Law and Procedure, 2nd Ed., Vol. LX, Part VI, Sec. 314 35
Penal Law of the State of N. Y., Sec. 2013 35
War Department's Basic Field Manual and Soldier Handbook, July 23, 1941, P. 193-194 40

Miscellaneous:

American Ephemeris & Nautical Almanac, 1944, Published by U. S. Naval Observatory 39
24th Article of War 20
Court Martial 161728, Clark 7, 27
Court Martial 183183, Claybaugh 7, 27
Court Martial 299477, Floyd, 17 B. R. 149, 153 and 156 ..... 7, 8, 27
Court Martial, 182225, Keller 7, 27
Digest of Opinions of the Judge Advocate General of the Army, Sec. 428, Page 293 ..... 15, 27, 28, 43
War Department Technical Manual—Military Justice Procedure, T. M. 27-255 13
1 Hale P. C. 635, 636 36
Meteorological Glossary, 3rd Ed., Published by the Meteorological Office of the British Air Ministry ... 39
Puttkammer, Consent in Rape, 1925, 19 Ill. Law Review, 410, 421 35
State of New York Law Revision Commission, Report, Recommendations and Studies, 1937, P. 473 ... 36
Winthrop's Law & Military Precedents, Vol. 1 and 2, Reprint of 1920, Pages 61, 62 and 63, Sec. 73 and 74 ..... 15, 29, 43

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Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENT.

I. Statement of Questions Involved.

1. The impartial investigator under A. W. 70 did not make a thorough and impartial investigation pursuant to A. W. 70 in that the investigation was not thorough, impartial or competently made.

2. The judgment of conviction of the defendant was against the weight of evidence and therefore error as a matter of law.

3. In trying the two cases together evidence in one case was added to evidence in the other case and a conviction in both cases resulted, whereas the conviction in either case on the evidence was insufficient as a matter of law.

II. Statement of the Case.

This action arises on the following charges:

1. Violation of A. W. 70—rape of Sheila Dale.

2. Violation of A. W. 93—"with intent to commit a felony, viz. rape. Committed an assault on Miriam Florence Cullum * * *."

The offenses were alleged to have been committed between 10:40 P. M. Tuesday, July 11, 1944, in the Cullum case, and in the Sheila Dale case, betwen 11:05 and 11:45 P. M. of that day. Each of the offenses took place in the same neighborhood, about five miles away from camp. The terrain was very hilly and upgrade from the scene of the offense to the camp (R. 208). Complaint was made to Constable Felton in the Cullum case 6 days later, on July 17th, when he called at her home. Complaint was made in the Dale case the next day, July 12th, about 10 A. M., when Dr. Beckett summoned the police, stating that the Dale girl consulted him complaining that she had been raped, that no contraceptive was used and she was worried lest she be pregnant. Neither girl nor their families called the police. On July 18th Constable Felton, a British police officer, called at the Rasden Aerodrome, and consulted with Lt. Todd, Provost Marshall, concerning the incident. He gave

a description of the assailant of the girls and thereupon Todd sent for a number of men who might be suspect. After nine men had been interviewed the defendant was summoned. The Collum girl claimed that when assaulted she bit her assailant's *right hand* near the thumb. No description of the bite was given. No mention was made as to whether blood was drawn or whether the bite caused a laceration. On interviewing the defendant in the presence of American officers, including Provost Marshall Todd who conducted the examination under A. W. 24, Constable Felton grabbed the defendant's hands and thereupon found a laceration of the *left* hand. The defendant stated that he had cut his hand with a cleaver opening cans of milk. Sgt. Pelletier, his superior, corroborated this explanation saying he saw blood running and dressed the wound. The defendant was arrested and confined to the guard house by Todd at 4 P. M. July 18. At 7:15 P. M. on July 18th a line-up was arranged by Todd wherein the defendant was identified by each girl. The defendant claims the line-up was conducted in a fraudulent manner. Constable Felton provided Todd prior to the line-up with a statement signed by the Dale girl dated July 17, 1944, and the Collum girl signed on July 17. Each girl supplemented her statement at the Bayeon Accident immediately after the line-up at 7:45 P. M. July 18 in Todd's office. Todd testified he *took a statement from Sheila Dale and she signed same and he authenticated same*. The only statement signed by Dale and authenticated by Todd is Ex. B (91-92). Todd testified the line-up was conducted about a week after he was appointed investigating officer. All Government witnesses testified the line-up took place within 4 hours after Todd first heard of the case and prior to July 19, 1944, the date of the charges. *The Government now admits Todd*

~~erred to his date.~~ (Page 19, Gov't Brief). Charges were signed by Capt. Ernest P. MacGregor. The impartial investigator, pursuant to Manual for Courts Martial could not legally be appointed prior to the signing of the charges. Todd knew of and testified to this. Todd conducted the line up and took the statements as Provost Marshall, then reported same to his superior officer. The superior officer appointed Todd as impartial investigator to determine the accuracy of the charges that Todd himself instigated. The actual appointment of Todd or the date of his appointment was missing from the Government records. Attorney for the defendant found same later at the date of argument of the appeal. Subsequent to his appointment as impartial investigator under A. W. 70 he again talked to the complainants, Dale and Cullum, and interviewed nine witnesses at the request of the defendant.

Todd made no investigation as to the reputation of either complainant as to chastity or virtue. He did not interrogate one Mrs. Kerry, who was with the complainant Cullum and the assailant and walked some distance with them immediately prior to the alleged assault, nor did he interrogate the policemen who passed them, the only disinterested witnesses re identity. Todd stated that Mrs. Kerry was not a necessary witness in that the defendant didn't request her testimony and the Government did not need her testimony. Smith testified at the hearing that Todd advised him not to have Mrs. Kerry called as a witness. Neither girl had any information concerning the assault on the other girl ~~prior to the meeting~~, so that the conviction in each case rested on the uncorroborated and unsupported testimony of each complainant. The defendant produced a witness who lived in the locality who testified that the Dale girl had a bad reputation for chastity. She was not

allowed to testify concerning the reputation of the Cullum girl. The physician called by Dale said he could not say a rape had occurred.

No physician was called by the Government to examine the defendant and ascertain whether the laceration on the defendant's hand was caused by a bite or a cleaver. A bite would cause two lacerations from the upper and lower teeth. There is evidence of only one laceration such as could have come from a cleaver. The scar was offered in evidence at Lewisburg and the Judge rejected the offer and refused to look at same (R. 26-27). The scar was a straight line scar (R. 15).

The defendant was represented on the trial by an air corps officer who was not a lawyer, although two men whom the Government claimed were lawyers sat in the trial as counsel. Neither participated in the trial. The Government was represented by two members of the Judge Advocate General's office, who were attorneys.

Six soldiers, including the sentry on the gate, testified the defendant was in camp at the time of the assault. The time of the assault, to wit: 11 to 11:45 P. M., fixed by Dale, was further corroborated by the fact that she couldn't ride her bicycle in that it had no lights and it was getting pretty dark (R. 133). The U. S. Nautical Almanac verifies this statement. English wartime was two hours faster than standard time.

On the trial Lt. Todd acted as Asst. Trial Judge Advocate.

The defendant was found guilty and sentenced to life imprisonment, which has been reduced to 12 years. He is now incarcerated in Lewisburg Penitentiary.

A rule permitting a writ of habeas corpus was filed by Honorable Frederick Follmer, U. S. District Judge. After a hearing the application for habeas corpus was denied. The Government included in the record before Judge Follmer C. I. D. reports which were not part of the trial and which the attorney for the petitioner was not permitted to see at the time on the ground they were confidential communications. Judge Follmer quoted from the C. I. D. reports in his opinion.

The defendant requested the Circuit Court to decide the case on the merits and did not ask for a technical reversal. The defendant calls the attention of the Court to the fact that the C. I. D. report is not a proper part of the case and is contained at Pages 79 to 82 of the record. This report was not before the court martial.

The District Court wrote an opinion denying the habeas corpus on August 7, 1947, from which decision the defendant appealed to the Court of Appeals for the Third Circuit. The case was argued April 8, 1948, and decided September 14, 1948, which decision reversed the District Court and directed the defendant be released from custody forthwith. From that decision the Government appeals.

1. The impartial and thorough investigation under A. W. 70 is jurisdictional

The courts have universally held or conceded that the thorough and impartial investigation is a jurisdictional requirement.

Hicks v. Hiatt, 64 F. Sup. 238;

Anthony v. Hunter, 71 F. Sup. 823;

Benjamin v. Hunter, 162 F. 2d 512;

Henry v. Hodges, 76 F. Sup. 968, reversed in that there was substantial compliance of A. W. 70;

University of Chicago Law Review No. 13 at 494;

Illinois Law Review No. 41 at 260;

Waite v. Overlade, 164 F. 2d 722, certiorari denied 334 U. S. 412;

DeWar v. Hunter, .. F. 2d .., decided 12/3/48;

Reilley v. Pescor, 156 F. 2d 632.

The Board of Review held as follows in 1924:

"* * * However, in 1924, the Board of Review held that the provisions of Article of War 70 and paragraphs 76a, Manual for Courts-Martial, 1921, relating to pre-trial investigation, were jurisdictional, and that failure to comply with them rendered the proceedings of the court void ab initio (CM 161728, Clark). Subsequent holdings of the Board of Review have reached the same result (CM 182225, Keller; CM 183183, Claybaugh). In neither of these latter cases was the holding based upon lack of jurisdiction; rather the theory appears to have been that failure to comply with Article of War 70 was per se an error injuriously affecting the substantial rights of the accused."

CM 299477, Floyd 17 Br 149, 153-156, decided February 2, 1943.

There is no court decision cited anywhere by the Government indicating that substantial compliance with A. W. 70 is not a jurisdictional necessity.

The Board of Review reports cited by the Government are not available to the defendant. The defendant is ad-

vised that the decision in the *Floyd* case, supra, wherein the Board of Review stated that A. W. 70 was not jurisdictional, cited by the Government, was in fact dicta. Under the Federal Constitution all persons are entitled to due process of law. A citizen in the United States Army is subject to court martial law in lieu of the civilian law. The law under the Articles of War is intended to give the defendant substantial justice, although same is somewhat streamlined. In that many of the protections afforded a civilian citizen are denied a soldier, the few safeguards given a soldier must be therefore more rigidly adhered to and respected.

* * * * *

Comparing the rights of a soldier and citizen, the following chart as to relative rights is submitted:

	Citizen	Soldier
1. Entitled to counsel at all stages of the proceeding	Yes	No
2. Prompt arraignment before a magistrate and be confronted by his accuser on an examination	Yes	No
3. To have case considered by grand jury	Yes	No
4. To be tried by an impartial jury of citizens	Yes	No
5. To subpoena witnesses and cross examine them[2]	Yes	No

[1] The soldier is only entitled to counsel at the court martial hearing. He is entitled to none at the A. W. 70 investigation (Government Brief, P. 20).

[2] The soldier can have witnesses "if available." There is no power of subpoena (Government Brief, P. 20).

6. To be tried before an impartial court which is not accountable to anyone for its decision Yes No

7. To argue appeals by counsel Yes No

The Government contends that A. W. 70 is for the guidance and benefit of the superiors only and that the defendant has no rights thereunder.

Hence a soldier is entitled to be tried by a group of officers appointed by their commander in lieu of the safeguards a citizen is entitled to as delineated above.

The Government offers little incentive to a citizen to become a member of the armed forces of the United States.

In addition to pledging his life if needs be in the defense of his country, as a matter of law the Government contends all rights under the Constitution are substantially denied him.

It has been held that soldiers or men in the armed forces are entitled to the fundamental protection of the Constitution. It is of utmost importance that every citizen, civilian or soldier, be entitled to reasonable safeguards to protect him from oppression and to preserve his dignity as a citizen. The soldier receives little by way of protection under the Court Martial Law as it now exists, conceding that the fair and impartial investigation under A. W. 70 is jurisdictional. If A. W. 70 is not jurisdictional the soldier is stripped of practically all rights.

The Government can not be serious in urging that A. W. 70 is not jurisdictional. The Government adopts inconsistent arguments in its brief.

"His (Todd's) investigation was sufficiently 'thorough' when he became convinced that, regardless of what else he might uncover by further investigation, he had no alternative than to recommend a general court-martial trial. No matter what Mrs. Kerry might have said to him—even if she were able positively to state that respondent was not the man who accosted her and Miss Cullum shortly before the attack on the latter—Todd still would have had to recommend trial in view of the evidence already in his possession. A 'thorough' investigation, therefore, did not require him to question Mrs. Kerry even against respondent's wishes." (Gov't Brief, P. 23.)

Todd as Provost Marshall was convinced of Smith's guilt at 4 o'clock in the afternoon on July 18th when he locked Smith in the guard house. The Government argues that under those facts an A. W. 70 was unnecessary—Todd already believed Smith guilty.

* * * * *

"He (Todd) was not required to convince himself beyond a reasonable doubt of respondent's guilt in order to recommend that he be brought to trial." (P. 33, Gov't Brief.)

Todd felt that Smith was guilty. Otherwise he wouldn't have locked him up. There was a reasonable doubt in Todd's mind as to his guilt which was resolved against the defendant.

"If she (Mrs. Kerry) was unable to identify him, her testimony would have been merely negative in character and hence could have had no influence one way or the other on Todd's decision to recommend trial." (P. 34.)

The Government concedes Todd was so prejudiced that if Miriam Cullum's testimony was disputed by Mrs. Kerry even that would not affect Todd's opinion re Smith's guilt. If Miriam Cullum was mistaken concerning her attacker perhaps the testimony of the woman of easy virtue, Sheila Dale, might have been attacked had Todd found out her reputation in the community or made inquiries of Kentucky as to whether or not she had had relations with Kentucky that evening. The Government urges that nothing could change Todd's mind. He learned nothing under A. W. 70 that he hadn't already learned under A. W. 24. Consequently he couldn't be impartial.

* * * * *

> "We do not, of course, contend that the provisions of A. W. 70 may be ignored by the military authorities. Nor do we contend that A. W. 70 confers no rights on an accused. On the contrary, we readily concede that A. W. 70 confers definite rights on an accused—rights, which he may insist upon before trial and at the trial, and concerning the deprivation of which he may complain, if necessary." (P. 50; Gov't Brief.)

The Government concedes that A. W. 70 can not be ignored. Does merely filling out mimeographed forms comply with A. W. 70 or should the words, "thorough and impartial" be construed in their normal meaning? Judge Briggs stated in *Hicks v. Hiatt* that an A. W. 70 investigation incompetently made was not thorough and impartial. If Smith was entitled, as the Government concedes, to the provisions of A. W. 70, then those provisions had to be carried out in a reasonable manner. When the Government concedes that evidence could not change Todd's mind con-

cerning Smith's guilt then the Government concedes that was impossible for Todd to be impartial.

Todd was convinced of Smith's guilt after the A. W 24 investigation. The Government argues that A. W. 70 while a right granted to the soldier was a naked right A naked right is no right.

Had an impartial person conducted the A. W. 70 investigation he would have been thorough and impartial. The Government admits Todd was biased when he began the A. W. 70 investigation as a result of his A. W. 24 investigation.

Smith was a private in the U. S. Army having been charged with an offense punishable by death. At that time he did not have counsel and was not entitled to any. Under A. W. 70 Lt. Todd was appointed as an impartial investigator. Todd was a lawyer and an officer. He shirked his duty to make a thorough investigation of the case by saying that he asked Smith as to whether he should interrogate Mrs. Kerry. Smith had no qualifications to determine whether or not that evidence was pertinent. It was Todd's duty, as impartial investigating officer to get all available evidence and in order to permit him (Todd) to decide on all the evidence as to whether to recommend the accused be brought to trial. Had Todd interrogated Mrs. Kerry or the policemen in the presence of the accused then the accused would have known as to whether or not to have had them subpoenaed for the trial. The accused didn't know whether Mrs. Kerry would identify him or not. Neither did Todd. The accused and the Government both were entitled to know what evidence was available, whether the evidence was beneficial or detrimental. Todd attempted to

shift his responsibility as investigator over to Smith. This was fundamentally wrong.

The War Department Technical Manual entitled "Military Justice Procedure" (TM 27-255), prescribed (Par. 41, p. 37):

> It is not the investigator's function to build up a case against the accused, but to ascertain and impartially weigh *all* facts in arriving at his final conclusions. He is required to conduct "a thorough and impartial investigation" (A. W. 70). All available evidence should be exhausted. The investigating officer is not limited to examination of the witnesses and documentary evidence indicated on the charge sheet; he should extend his investigation as far as may be necessary to make it thorough.

And the same manual further prescribes (Par. 42b, p. 38):

> b. At the outset, the accused should be advised that an impartial investigation of the charges is to be conducted. The nature of the charges, the name of the accuser, *and the names and substance of the testimony of all witnesses should be made known to him.* (Emphasis ours.)

Other errors.

A. W. 8 was violated. This was a jurisdictional error.

> * * * the authority appointing a general court martial shall detail as one of the members thereof a law member who shall be an officer of the Judge Advocate General's Department except when an officer of that department is not available for the purpose the appointing authority detail instead an officer of some

other branch of the service selected by the appointing authority as especially qualified to perform the duties of a law member * * *."

The members of the court were:

Col. Donald P. Graul, 017557, Sig C.
Lt. Col. Wesley W. Harting, 0485609, CE
Maj. Hugh B. Speir, 0485137, AC
Maj. Ceylon B. Frazer, 0512575, GSC Law Member
Maj. Charles T. Bruett, 0905620, AC
Maj. Noble H. Hodge, 0430731, AC
Capt. James C. Cope, 0419592, MC
Capt. John B. Rose, Jr., 024960, AC
Capt. William S. Woolsey, 0855845, AC

(P. 112)

None of the aforesaid members were members of the Judge Advocate General's Department. Yet Cap. Harley J. McNeal, 0914222, JAGD, (Judge Advocate General's Department) Trial Judge Advocate, was produced by the Government to prosecute the defendant. The law required a member of the Judge Advocate General's Office to be on the bench, and those in authority made a member of the Judge Advocate General's staff a prosecutor and thus deprived Smith of the benefit of a lawyer on the Court pursuant to A. W. 8. The defendant's rights were thus prejudiced.

2. Todd was not an impartial investigator under A. W. 70.

Lt. Todd was the Provost Marshall of the Raydon Aerodrome. At a hearing at Lewisburg Todd testified that the British constable first consulted him on July 18th, at 11 o'clock A. M. (R. 31). Eight or nine men had been brought before Todd and the British constable for questioning. At

3:30 P. M. the defendant was questioned by Todd and Felton for two hours (R. 200). Felton said to Smith: "Show me your hands" (R. 194). He was not advised that he was suspected of a serious offense. Felton saw a scab on the ball of the left thumb (R. 192). Smith said he was cut by a cleaver opening cans (R. 211). Smith was placed under arrest by Todd and confined to the guard-house at 4 P. M. "I took Smith's commanding officer into his cell" (R. 32). At 7:15 P. M. that day the identification parade was conducted by Todd (R. 32). Todd testified that Sheila Dale gave him a statement which she signed and he authenticated (P. 36). The only signed and authenticated statement of Sheila Dale is Exhibit B (P. 255, 256 and 257). Miriam Cullum said she gave a signed statement to Lt. Todd (P. 176). Both of these statements were taken at 7:45 P. M., July 18th, after the line-up. The Government now claims that Todd did not take the statements, although both he and the Cullum girl testified that he did take the statements. On July 19th, after Todd had made a report, Capt. Ernest P. MacGregor signed charges alleging that Smith violated the 92nd and 93rd Articles of War, on information and belief (R. 101). Todd was the accuser in fact and his charges were adopted by Capt. MacGregor. This was a violation of army regulations (Digest of Opinions of J. A. G. of the Army, Sec. 428, Page 293; Winthrop Military Law & Precedence, Vols. 1 and 2, Reprint of 1920, Pages 61, 2 and 3, Secs. 73 and 74). Todd testified that he was appointed impartial investigator some time prior to the line-up. The Government now admits that Todd was in error in this regard (R. 32). He could not have been appointed impartial investigator until after charges were filed and signed (35½ M. C. M.). The line-up was July 18th. The charges were dated and verified July 19th. The record discloses Todd was appointed A. W. 70

on July 20, 1944. Todd was appointed as impartial investigator to pass upon charges that he himself originated. He could not be impartial as a matter of law.

About a month previously Todd had a controversy with the defendant wherein he threatened the defendant (R. 42-43, 27, 31-32).

Todd first learned of the offense complained of herein when the British constable came to consult him as Provost Marshall of the Raydon Aerodrome, complaining that two British girls had been molested (R. 31). That was the first time Todd knew that anything of this type had happened. The British constables and Todd questioned 8 or 9 men between 11 A. M. and 3:30 P. M. on July 18th, prior to questioning Smith (R. 200). Todd said that both he and the British police questioned Smith (R. 32). Smith testified at Lewisburg that he was questioned by Todd and the British constables for about 2 hours. Todd put Smith in jail at the conclusion of the questioning. Todd said:

> "I took his commanding officer into his cell and asked Smith if he had any objection to any type of line-up and he said he had not." (R. 32.)

Smith was taken out of his cell to attend the identification parade which took place about 7:15 P. M. on July 18th (See Statements of Mirjam Cullum, Sheila Dale and Constable Felton, Exs. B, p. 1, 2, 3, 4 and 6.)

At the conclusion of the identification parade Smith was returned to his cell by Todd (R. 33).

At 7:45 P. M., July 18th, after the line-up, Todd took additional statements from Miriam Cullum, Sheila Dale and Constable Felton (Ex. B, p. 1, 2, 3, 4, 6 and R. 36, 176). The girls were in Todd's office (R. 17, 135); his office was in the guard house R. 13).

Todd was running the entire proceeding under A. W. 24. Smith testified at Lewisburg that Capt. MacGregor sent for him and said that Todd wanted him to appear before him with Capt. MacGregor (R. 13). The questioning, according to Todd, was done by him and the British constables (R. 32). It was MacGregor who actually signed the charges. *The fundamental error of the case is that no one was protecting Smith.* Todd testified he brought Capt. MacGregor to see Smith in jail so that *MacGregor could protect Smith's rights* (R. 32). All of this transpired on July 18th, prior to charges being filed.

Summary.

Todd as Provost Marshall under A. W. 24 (R. 33):

(1) Had MacGregor summon Smith to be questioned; (R. 13)

(2) Questioned the British constables and thereafter summoned Smith for the hearing; (R. 31-32)

(3) Had Smith before him once before on some other difficulty wherein Smith claimed Todd threatened him; (R. 12 and 27)

(4) With the British constables questioned Smith (R. 37) according to Smith for 2 hours; (R. 28-29-30)

(5) Had Smith confined to jail after the questioning (R. 32). He was in his cell (R. 74). Date of confinement July 18, 1944, 1600 hrs., or 4 P. M. (R. 74)

(6) Brought MacGregor to Smith's cell to inquire with regard to the line up, to protect him (R. 32).

(7) Arranged for the line up (R. 32).

(8) Took supplemental statements from Sheila Dale and Miriam Cullum, the complainant in each case. (R. 36).

(9) Had Smith returned to jail (R. 33).

(10) All these things happened July 18, 1944, two days prior to his appointment as impartial investigator under A. W. 70 (R. 99).

(11) Based on Todd's investigation as set forth above, on July 19th MacGregor, whom Todd called in to protect Smith, preferred the charges (R. 74-75-76) on information and belief.

(12) July 20th Todd was appointed impartial investigator under A. W. 70 (R. 99).

(13) TODD AT THE TIME OF THE APPOINTMENT HAD HAD SMITH IN JAIL FOR TWO DAYS.

(14) As a matter of law he could not be impartial.

No witness was called at the impartial investigation that added anything to the statements which were taken by Todd prior to his appointment as impartial investigator (See pre-trial investigating officer's report, R. 85 to 99).

Todd's impartial investigation consisted of going through certain motions to comply with A. W. 70. On July 24th, the date he filed that report, the only additional facts that he had acquired were: Pvt. William Vandergrift saw Sheila Dale crying at her home (R. 88) at about a quarter to 12.

Todd's entire investigation of the prosecution case consisted of examining the statements from the pocketbook of Constable Felton with whom Todd worked in this case, as well as taking supplemental statements with Felton after the line-up at 7:45 P. M. July 18th. A compilation of the statements is as follows:

Name of Witness	Date and Time of Statement	Page Appearing in Constable Felton's Book
Dr. Beckett	10:15 A. M. July 12	111-112
Sheila Dale	10:30 A. M. July 12	112-119
Ellen May Dale	3:30 P. M. July 12	122-125
Pamela Daley	11:00 A. M. July 13	125-129
Betty Goodall	12:15 P. M. July 13	129-130
Miriam Cullum	7:30 P. M. July 17	131-137
Frank Welham	7:30 P. M. July 17	138-139

Supplemental statements taken at Raydon Aerodrome by Todd and Felton in Todd's office on July 18th after the line-up:

Sheila Dale	7:45 P. M. July 18	141
Miriam Cullum	7:45 P. M. July 18	142

It will be noted that the dates and pages in the constable's book are consecutive. Todd admitted at the Lewisburg hearing that he took a statement from Sheila Dale which she signed and he authenticated (P. 36). It is true he claimed he did this as impartial investigator, but Todd was mistaken as to the time of the impartial investigation. He claimed his A. W. 70 investigation was a week after the line-up (P. 36). The Government claimed Todd was right until the record was actually produced showing that he was wrong. Now the Government admits Todd was wrong. If he was wrong concerning the date of the line-up he was wrong concerning the date of the statement. (Gov't Brief, Foothote 13 on Page 19) The only statement signed by Sheila Dale and authenticated by Todd appears at 255, 6 and 7. There is no other statement in the record anywhere signed by Dale and by Todd.

At the time Constable Felton first consulted with Todd on July 18th he had all those statements and presumably

turned the file over to Todd. Todd did not learn any single fact concerning this case after his appointment under A. W. 70 that he did not have in writing on July 18th, two days prior to his appointment.

All witnesses at the trial, and every person who made a written statement, stated the line up was July 18th at about 7:30 to 7:45 P. M. Todd denied this. Now the Government admits Todd's error (Brief on Certiorari, p. 9). No witnesses disputed the time. At Lewisburg Todd told how he arranged the line-up (R. 32). Concerning his actions immediately after the line-up he testified as follows:

> "Q. Subsequently was Smith brought into the Provost Marshall's Office?
>
> A. Smith was taken to his cell and his captain went along with me and I asked Smith if he thought the line-up was conducted in a fair manner, and he said it was but still protested his innocence. At no time did I threaten Smith and tell him that he had to answer questions or his right to get into the line-up or I would bring the girls into the cell. *I was acting under the 24th Article of War.*" (R. 33.)

The 24th Article of War provides as follows:

> "ART. 24. *Compulsory Self-Incrimination Prohibited.*—No witness before a military court, commission, court of inquiry, or board, or before any officer conducting an investigation, or before any officer, military or civil, designated to take a deposition to be read in evidence before a military court, commission, court of inquiry, or board, or *before any officer conducting an investigation*," shall be compelled to incriminate himself or to answer any question the answer to which may tend to incriminate

him, or to answer any question not material to the issue when such answer might tend to degrade him. (* Emphasis supplied.)

Todd therefore admitted he was conducting an investigation. His only capacity to conduct the investigation at that time was as Provost Marshall. Todd was appointed impartial investigator under A. W. 70, July 20th. The charges were filed July 19th. He could not have been appointed impartial investigator prior to the filing of the charges (Sec. 30 M. C. M.). Todd therefore admitted by indirection that he was the accuser in fact and the impartial investigation provided by law under A. W. 70 was a farce.

Todd having conducted the inquisition under A. W. 24 stated:

"Q. Prior to the time of your having been appointed investigating officer under A. W. 70 had you formed any opinion in your mind as to the guilt or innocence of the accused?

A. I had not. I was of a perfectly fair mind. When I was appointed investigating officer I wanted to get at the truth of the matter." (R. 33.)

At that time Todd had Smith locked up in jail for two days.

The foregoing question and answer is so apparently erroneous or false it is unnecessary to discuss same.

* * * * *

Concerning Todd's explanation of the absence of Mrs. Kerry, the impartial witness, he stated as follows:

"So far as from a prosecution standpoint it was not necessary. As far as from a defense standpoint I

asked Smith if he wanted her and he said 'no.'" (R. 35.)

Todd by that answer admitted that he was judging the case from the prosecution standpoint and Smith apparently was conducting his own defense. At one point he called in Capt. MacGregor to protect the defendant (R. 32).

3. Statements were taken by Todd and Felton from Miriam Cullum and Sheila Dale on July 18th at 7:45 P. M. at Raydon Aerodrome.

The Government denied the statements (P. 255 to 260) were taken by Todd. (Gov't Brief, P. 44.)

Judge McLaughlin in the prevailing opinion in the Court of Appeals commented on Todd's taking of the statements. The Government indicated Judge McLaughlin was mistaken. *Judge McLaughlin was not mistaken.* Todd admitted he took a statement from Sheila Dale and that at the end of the statement she signed it and he authenticated it. (P. 36.) Sheila Dale signed the statement at 7:45 P. M. July 18th at Raydon Aerodrome (P. 257-58). There is only *one* statement signed by Sheila Dale authenticated by Todd. There are other collateral facts which indicate that Todd was correct when he said he took the statement from Sheila Dale.

1. The statement was taken at 7:45 P. M. at Raydon Aerodrome (P. 30).

2. Miriam Cullum's statement was taken at the same time and place.

3. From examining the photostatic copies of the statements it is clear that both statements were typewritten at the same time.

4. The phraseology of the last two paragraphs of Sheila Dale's and Miriam Cullum's affidavits are almost identical in language.

5. The two girl complainants were brought to Raydon Aerodrome for the identification parade and Constable Felton testified that the girls were in Lt. Todd's office at the time the identification parade was held (P. 195).

6. Miriam Cullum went back to Todd's office when Shelia Dale came out to attend the identification parade (P. 195).

7. One of the girls testified at the trial that she gave the statement, Exhibit B, to Lt. Todd on July 18th. That statement was marked "Exhibit B." (R. 176.) Judge McLaughlin stated:

> "Exhibit B for the defense, referred to at the trial as the statement of Sheila Dale to Lt. Todd, appears to be the record of such interview." (P. 278.)

8. Smith testified at Lewisburg that the girls were in Todd's office prior to the line-up (P. 17). Todd's office was in the guard house (P. 13). Both girls were in Todd's office immediately prior to the line-up and were returned there after the line-up. Todd conducted the line-up (R. 32). Felton was present (P. 195). Each girl separately viewed the men in the line-up and returned to Todd's office (P. 195). Smith was originally interrogated in Todd's office by Todd and Felton (P. 33).

Todd admitted he was conducting an investigation under A. W. 24 (R. 33). If he were diligent and on the job he would have taken the statements himself from these girls after the line up. The British officers could not conduct Todd's A. W. 24 investigation. Todd's testimony in the record substantiates our contention.

The Government is now suggesting that Todd was as lax in conducting the A. W. 24 investigation as Smith contends he was lax in the conduct of the A. W. 70 investigation.

The Government never raised any question in this regard at any time in any of the courts below.

4. The investigation under A. W. 70 was not thorough.

(a) The thorough investigating officer made no investigation concerning the reputation of the complainants for chastity in the community in which they lived.

(b) Mrs. Kerry was the only disinterested witness re identity. She was not interviewed by the impartial investigator. No explanation is offered for such failure. Miriam Cullum, while walking with Mrs. Kerry, met her assailant. A conversation was carried on between the assailant, Cullum and Mrs. Kerry. They apparently walked some distance together (R. 164-165).

The defendant testified at the hearing that he requested Todd to question Mrs. Kerry and that Todd advised him that from a defense standpoint it would be advantageous to his case if Todd did not question Mrs. Kerry.

Todd testified as follows:

"Q. At the time you were interrogating various witnesses with respect to the matter did the name of Mrs. Kerry come up?

A. Yes, the name of Mrs. Kerry did come up.

Q. Do you know what attempt, if any, was made to interrogate her and any reason why she wasn't?

A. So far as from a prosecution standpoint it was not necessary. As far as from a defense stand-

point I asked Smith if he wanted her and he said 'no'."

The British policemen could have been interviewed (R. 171). They seemed to know the assailant. They spoke to him.

(c) Todd was not thorough by failing to have a doctor examine the laceration and give an expert opinion as to whether it was a bite or a cut. He was required to make a thorough and impartial investigation. He acted as a prosecutor in determining that "her testimony was not necessary from a prosecution standpoint." He was not thorough in that if the investigation was competently made he either knew or should have known that Mrs. Kerry's and the constables' testimony was of greatest importance.

No witness corroborates the Cullum girl's testimony at any point excepting that someone saw her crying after her alleged assault. She did not complain to the police or authorities until a week had elapsed. Prompt complaint of an assault or attack might be considered corroboration, but a complaint made a week later is no corroboration whatsoever.

Todd conducted the investigation in this case solely on the affidavits presented him by the British police officer when Todd was Provost Marshall. The one important witness, who was disinterested and who could identify the assailant of Miriam Cullum, was Mrs. Kerry. She never was interviewed by Todd.

Smith claimed at Lewisburg that Todd advised him not to call Mrs. Kerry on some theory, that it would be to Smith's advantage (R. 20).

Todd was a lawyer and either knew or should have known the law. He advised Smith not to call Mrs. Kerry. He did not do anything towards investigating the case subsequent to his appointment as impartial investigator.

As A. W. 70 investigator he merely approved his own findings and determination made when he was acting as Provost Marshall. That determination resulted in Smith being put in jail on the afternoon of July 18th at 1600 o'clock or 4 P. M. (R. 749).

Had he conducted a thorough examination he would have called a physician to determine whether the single laceration on Smith's hand was caused by a bite or a cut by a cleaver. Any physician could easily determine that. (See Dr. Murphy's affidavit filed with District Court.)

He made no investigation as to the character of the girls. The defendant was able to produce a reputable woman from the community who testified that Sheila Dale had a bad reputation. She started to testify that Miriam Culhun was also of a bad reputation. It was ruled out on an objection (R. 238). That information certainly was available to Todd had he elected to make such an investigation.

For these reasons the investigation was not thorough.

> "The investigation of the charge was not thorough in that it was not made competently." (*Hicks v. Hiatt*, 64 F. Supp. 238; *Anthony v. Hunter*, 71 F. Supp. 823.)
>
> "The thorough and impartial investigation under A. W. 70 is jurisdictional." (*Hicks v. Hiatt, supra; Anthony v. Hunter*, supra.)
>
> "* * * However, in 1924, the Board of Review held that the provisions of Article of War 70 and paragraphs 70a, Manual for Court-Martial, 1921, relat-

ing to pre-trial investigation, were jurisdictional, and that failure to comply with them rendered the proceedings of the court void ab initio (CM 161528, Clark). Subsequent holdings of the Board of Review have reached the same result (CM 182225, Keller; CM 183183, Claybaugh). In neither of these latter cases was the holding based upon lack of jurisdiction; rather the theory appears to have been that failure to comply with Article of War 70 was per se an error injuriously affecting the substantial rights of accused." (CM 299477 (*Floyd* 17 Br. 149, 153-156 (decided February 2, 1943.)

* * * * * *

"The course of administration involving action by one and the same officer as accuser and investigating officer in the same proceeding met with the disapproval of the Secretary of War." (Digest of Opinions of the J. A. G. 1912-1940, P. 293, Sec. 428.)

* * * * * *

"Investigation by Accuser. Several records of trial by general court martial received in the office of the Judge Advocate General indicated that some confusion existed in the service as to the requirements of A. W. 70 regarding the 'thorough and impartial investigation' of charges. The validity of the sentence in each of the cases covered by those records was brought into question by reason of the fact that the investigation conducted under the second paragraph of A. W. 70 has been made by the officer signing the charges under the oath prescribed by the first paragraph of that article. The course of administration thus disclosed, involving action by one and the same officer as accuser and as investigating officer in the

same proceeding, met with the disapproval of the Secretary of War.

Accordingly, under date of January 15, 1929, instructions were communicated, by order of the Secretary of War, to each officer exercising general court-martial jurisdiction, directing that steps be taken to make certain that the investigation required by the second paragraph of A. W. 70 be made by an officer other than the signer of the charge under investigation. 250.45, Jan. 10, 1929." (Digest of Opinions of the Judge Advocate General of the Army, Section 428 at page 293.)

* * * * *

Construction of terms "accuser" and "prosecutor":

"As indicated by the use of the disjunctive 'or' these terms are evidently intended to bear a somewhat different signification. To distinguish therefore the two designations—*'accuser' is construed to mean either one who originates the charge or adopts and becomes responsible for it;* 'prosecutor' one who proposes or undertakes to have it tried and approved * * *

* * * *where having personally originated or adopted the charges,* he has preferred them as his own, or *caused them to be preferred nominally by another for him with the purpose of having them brought to trial he is in general properly the 'accuser'* even if he may occupy no hostile or adverse position towards the accused. So, if influenced by hostile feeling, or by a conviction that the accused is guilty and that his offense demands to be promptly and efficiently dealt with, *he proposes upon assembling the court at-*

tively to promote the prosecution, as by instructing the judge advocate, facilitating the attendance of witnesses for the prosecution, appearing himself as a prosecuting witness, &c., he is properly to be deemed a 'prosecutor' within the meaning of this article, and it will not be legal for him to order the court, but the president must be resorted to for the purpose." (Winthrop's Military Law and Precedents, Vols. 1 and 2, Reprint of 1920, Pages 61, 62 and 63, Sections 73 and 74.) (Emphasis supplied.)

Mrs. Kerry and two policemen were the ONLY disinterested witnesses as to the identity of the assailant. There is no explanation as to the failure of the Government or the Court to call Mrs. Kerry or the policemen.

Mrs. Kerry was the only person other than the Dale and Cullum girls who saw the assailant at sufficiently close range to identify him. Miriam Cullum testified that she was just leaving Brantham about 20 minutes to 11 on July 11th with Mrs. Kerry (R. 164). Mrs. Kerry was walking and the Cullum girl was pushing her bicycle; that while so walking an American soldier came back and asked where they were going and Mrs. Kerry made some reply. He then asked if he could see them home and Mrs. Kerry said, "No, thanks." When they got to the Crown Public House "he was still walking along the side of us and asked us where we lived." Mrs. Kerry replied she lived at Brantham and they continued to walk on. When they got to a point between the two bridges the American moved off and asked if he could see us home and Mrs. Kerry said, "No, thanks." Then she said goodnight to me and I got on my bicycle and at the bridge he caught me up" (R. 165). The American referred to above was the assailant of Miriam

Cullum. Mrs. Kerry was the most important witness in the entire case had she been called. There is no explanation for the prosecution not producing Mrs. Kerry. When the prosecution failed the Court should have called Mrs. Kerry. The defendant according to his affidavit filed with the District Court stated that he wanted to see Mrs. Kerry and Todd advised him not to see her; that if he was not with Mrs. Kerry the night in question that then Mrs. Kerry could testify truthfully that she had never seen the defendant before in her life. The defendant was lulled into security, believing that she would be present at the trial and the prosecution double-crossed the defendant by not producing her as a witness.

The two special policemen who passed Mrs. Kerry, Miriam Cullum and her assailant could have testified as to the identity of the assailant (R. 171). As public officials and policemen they were readily available. The testimony indicates the policemen knew the assailant.

5. The provisions of the Manual of Courts Martial were violated to the prejudice of the defendant.

The defendant was ordered by his commanding officer, Capt. MacGregor, to report to him. The defendant inquired of Capt. MacGregor, the purpose of the summons and MacGregor replied: "Lt. Todd wants to see you, I don't know what he wants." Thereupon MacGregor escorted Smith to Todd's office. At Todd's office he was quizzed for three hours by Felton and Lt. Todd in Capt. MacGregor's presence. At one time during the quiz, the defendant refused to answer and the defendant turned to Capt. MacGregor and said, "Captain, am I required to answer these questions?" The Captain nodded to Lt. Todd and indicated

that the defendant should do as directed by Lt. Todd. Todd then told him to answer the questions as propounded by Colton or go to jail. "Command of a superior officer is presumed to be a lawful command." (Sec. 134-b, 64th A. W.) The punishment for wilfully disobeying a superior officer is: "1. Suffer death or such other punishment as a court martial may direct." (Article 64.) The defendant was not in a position to argue with his superiors.

Capt. MacGregor swore to the charges on information and belief (R. 117). He stated he had investigated the charges, but as a matter of fact the charges had been investigated by Lt. Todd and adopted by Capt. MacGregor.

> "An accuser or a prosecutor could not be a member of a court martial." (A. W. 8.)

By the same reasoning an investigator of the charges can not be the impartial investigator pursuant to Sec. 35, M. C. M., wherein he is directed to investigate "the truth of the matters set forth in the charges, form of charges and what disposition of the case should be made in the interest of justice and discipline."

6. The identification parade was improperly conducted.

Smith testified the C. I. D. man asked him if he wanted to change his position in line.

> "Before he had completed talking to me the other girl was brought out" (R. 216).

The second girl was brought out while the C. I. D. man was actually talking to Smith (R. 216). Smith testified Miriam Cullum was practically forced to go down the line to look at the men and she had her head half covered up

He said Sheila Dale walked down the line and had hysterics or something and one of the officers or C. I. D. men walked over to Smith and then Sheila Dale put her hand on him. He was not asked to show his teeth and Smith's hands were behind his back (R. 216). Constable Felton corroborates Smith as follows:

> "Q. What, if anything, did you see the person known as Sheila Dale do at the time the identity parade was held?
>
> A. I walked with her along the road and she picked out the man who assaulted * * *" (R. 194).

There is no contradiction of Smith's testimony in the record. Smith filed an affidavit with the District Court wherein he stated that the Dale and Cullum girls were kept in Todd's office prior to the line-up and that they could see the scene of the line-up through a window. Constable Felton answered this accusation as follows:

> "Q. Do you know whether or not from the offices of Lt. Todd anyone could see the soldiers line up in the parade?
>
> A. No, sir, they could not.
>
> Q. How do you know?
>
> A. You can't see out the windows, *NOT AT THE BOTTOM*" (R. 195).

The windows were hung in such a manner that they hinged from the bottom and Smith claimed in his affidavit that the girls could see the line-up over the top of the window.

The integrity and fairness of the line-up in view of Smith's accusations and the Government's failure to refute or even deny same is open to question. The defendant's affidavit contends that Constable Felton was alone with the

two girls in Todd's office prior to the line up, the inference being that Felton described the defendant to the girls.

7. There is a serious question as to whether a rape in fact occurred on Sheila Dale. The crime of rape had to be proven and conclusively established before anyone could be convicted.

She didn't report it to the authorities until she was being examined by a physician the next day to ascertain whether or not she was pregnant. Then the physician reported it to the authorities. The physician stated that she was not a virgin and that he could not testify that she had had intercourse recently. She was not bruised inside and she only had three bruises on her body—one on her right thigh, her left knee and left arm, which could have been caused by the bicycle fall (R. 178). There were no marks about her neck although she testified that he put his hands on her throat and told her if she didn't stop screaming he would murder her (R. 155). Her glasses were not knocked off and she said she struggled with him (R. 137). She didn't put up much of a fight. She said she kicked and struggled but the only thing she apparently accomplished was that she kicked off her knickers (R. 138). She didn't kick him in the groin because she thought it might injure him (R. 142). She said he was hurting her although she seemed to know that he did not put on any contraceptive (R. 142).

In fact, the examining physician testified:

> "Q. When this girl came to you did she come with a view to getting this 'prostigmine' test for pregnancy?
>
> A. No. She came claiming she had been raped by a man and no contraceptives were used and she was

worried about it in case she were pregnant." (R. 164).

Dr. Davidson testified there was semen on her knickers but there is no evidence as to where the semen came from and there is no evidence indicating whether or not she had relations with the boy she was out with previously that evening—"Kentucky." (R. 149). She was not even asked the question. Under the circumstances there is grave doubt as to whether or not she was actually ravished, considering her reputation in the community, her perfunctory defense and her failure to report the matter to the police; although she might have had intercourse that evening. Had the doctor not called the police for the purpose of protecting himself the matter probably never would have been reported to the authorities. There was ample time between midnight and 10 o'clock the next morning for her or her family to call the police before she went to the physician to ascertain whether or not she was pregnant.

Betty Goodall testified she heard a scream about 11 o'clock which was "ordinary," and there was no "fright in it" (R. 190). This was about a half hour before Sheila Dale was assaulted.

> "Mere verbal protestations and a pretence of resistance are not sufficient to show want of consent, and where a woman fails to take such measures to frustrate the execution of a man's design as she is able to and are called for by the circumstances, the inference may be drawn that she did in fact consent. It has been said of this offense that 'it is true that rape is a most detestable crime * * *; but it must be remembered that it is an accusation easy to be made, hard to be proved but harder to be defended by the

guilty accused, though innocent." (1927 M MCM P. 165.).

The law of England provides as follows:

"In cases of rape and other sexual offenses against women, girls and boys, the jury may convict on the uncorroborated evidence of the prosecutrix or prosecutor but the judge should warn them that it is dangerous to do so.

The Court of Criminal Appeal may quash a conviction in the absence of an adequate warning (k) or if the evidence which is referred to by the judge as corroboration is not corroboration (l) or is doubtful. Evidence of a complaint made by a prosecutrix or prosecutor is not corroboration of her or his evidence since it lacks the essential quality of coming from an independent quarter."

Halsey's Law of England, Criminal Law & Procedure, 2nd Edition, Vol. IX, Part VI, Sec. 314.

"No conviction can be had for rape or defilement upon the testimony of the female defiled, unsupported by other evidence. (*Penal Law of New York*, Sec. 2013.)

"If the commission of a sexual act becomes known the prosecutrix is impelled by many motives of self-interest to assert that it was done criminally. She has every selfish inducement to bring about a conviction, as every ground of acquittal, except possibly mistaken identity, would involve a reflection on her." (*Pittluauner, Consent in Rape*, (1925) 19 Ill. L. Rev. 419, 421.))

In *State of New York, Law Revision Commission Report, Recommendations and Studies*, 1937, Page 473, it is stated:

"The courts have always been cautious in dealing with these crimes and have been very reluctant to uphold convictions resting wholly upon the testimony of the prosecutrix. At an early date Sir Matthew Hale warned against the danger of such convictions and observed:

'* * * it must be remembered that it is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, though ever so innocent; * * *'

and that we should:

'be the more cautious upon trials of offenses of this nature, wherein the court and jury may with so much ease be imposed upon without great care and vigilance; the heinousness of the offense many times transporting the judge and jury with so much indignation that they are over-hastily carried to the conviction of the person accused thereof by the confident testimony, sometimes of malicious and false witnesses.' (1 Hale, P. C. 635-636.)"

Judge Cowan, writing for the Court of Appeals for the State of New York in *People v. Abbott*, 19 Wen 192, stated:

"Any fact tending to the inference that there was not the utmost reluctance and the utmost resistance is always received. A mixed case will not do. The connection must be absolutely against her will. The People v. Morrison, 1 Parker Criminal Report 625, the Court stated: 'The prosecutrix, if she was the weaker party, was bound to resist to the utmost. Nature had given her hands and feet with which she

could kick and strike, teeth to bite and a voice to cry out; all of these should have been put in requisition in defense of her chastity." It therefore follows that a passive or perfunctory resistance was not enough. Her resistance had to be active in proportion to the outrage. *People v. Carey*, 223 N. Y. 519."

In *People v. Dohring*, 59 N. Y. 374, Page 383:

"Of course the phrase 'the utmost resistance' is a relative one and the resistance may be more violent and prolonged by one woman than another, or in one set of attending physical circumstances than in another, but whatever the circumstances may be there must be the greatest effort of which she is capable therein to foil the pursuer and preserve the sanctity of her person. If she is conscious of what is attempted and has the possession of natural mental and physical powers in usual degree, and is not overawed by the number of assailants nor terrified by threats of death or the like, nor in such place and in such position as that resistance is useless. She must resist until exhausted or overpowered for a jury to find that it is against her will."

8. There was insufficient evidence to sustain a conviction in the case of Miriam Cullum.

She did not make a complaint to the police until a week had elapsed. At that time even Constable Pelton did not attach much significance to her claim until the "actual words" were added to her original version. At first she did not mention the "actual words." Someone either refreshed her recollection or suggested that her complaint would somehow aid Sheila Hale's case (R. 197). At the

time the complaint was made she told the Constable she bit her assailant. On the following day the Constable went to Raydon Aerodrome, and, as set forth, hereinabove, examined the hands of the 8 or 9 soldiers brought before him by Lt. Todd for examination. She said unequivocally that she bit the *right hand* (R. 259) of the defendant. Constable Felton effected his identification by means of the scab on the defendant's *left hand* (R. 193). At no point in her testimony did she describe the severity with which she bit her assailant. No mention is made as to whether or not blood was drawn. In the Raydon Aerodrome there must have been available physicians who could have easily noted the distinction between a bite, which is in fact a pinch or a squeeze, which would leave the imprints of the upper and lower teeth, and the laceration which was on the defendant's left hand and which was caused by a cleaver. This was a very important factor. From reading the testimony the Court must take judicial notice that the entire case hinged on the identification via the cut on the hand. The Government, rather than call a physician, relied on the lay testimony of Constable Felton that the cut on the defendant's hand could not have been made with a knife or cleaver. He made no examination of the teeth or appearance of the defendant as suggested by the complaints (R. 199) but merely relied on the cut on the hand. At that time Smith advised the Constable that he suffered the laceration from a cleaver (R. 199).

Sgt. Pelletier testified that he was present on That day at around 9:30 A. M. when Smith came to him with a cut on his hand; that at the time Smith said he got it while opening cans with a cleaver. He didn't actually see the accident but he knew what Smith was doing. He saw the blood running. He was his Chief Cook and superior officer

(R. 227), and Sgt. Pelletier dressed the cut for him (R. 229). Sgt. Pelletier stated that in opening cans with a cleaver a person was likely to get cut most anywhere (R. 230). A physician might have determined on July 18th not only whether the cut was from a cleaver or a bite, but he also might have been able to tell from the nature of the wound by examination as to whether or not it was five days or seven days old. This evidence in and of itself was sufficient to constitute a reasonable doubt as a matter of law.

The Court fell into error in combining the testimony of Sheila Dale and Miriam Cullum in such a manner so as to determine that the defendant was guilty in both cases, whereas in fact when the cases are severed and analyzed separately there is insufficient evidence in either case to warrant a conviction.

9. Smith conclusively proved he was in the Raydon Aerodrome at the time the alleged offense occurred.

Time was of greatest importance in establishing the defendant's alibi. Dale testified she left her assailant at 11:45; that she got home at 12 o'clock, about 5 minutes after she left her assailant (R. 144). In that she was corroborated by her sister, Pamela Dale (R. 158) and Pvt. Vandergriff (R. 162). In her statement, Exhibit B, page 3, she said she got indoors just after 12 o'clock. Her mother said she got home just after 12 o'clock (Exhibit B, page 5). She said it was dark enough so that she couldn't ride her bicycle without lights (R. 120); that it was getting pretty dark (R. 133). It took her 5 minutes to get home. Sunset was 10:19 British War Time. Twilight ended and full darkness began 50 minutes later, or 11:10 P. M. (Nautical Almanac for 1944 and British Meteorological Glossary, 3rd Ed.)

Court's Exhibit 1, the official passbook, indicated the defendant entered camp at 23 o'clock, which was the nearest hour to the time the defendant entered camp (R. 247). That book was kept to record the time the men check in (R. 248).

Defendant met Pvt. Angel Partyka, who was evidently a little intoxicated, and rode into camp with him without stopping, at about 11:30 (R. 219-220).

Harrison Wakeley, Government witness, sentry at the gate, saw the defendant enter the camp about 11:45 P. M. He was relieved from duty that night at 11:50 P. M. and he said it could have been a half hour before he left his post that Smith entered the camp (R. 219-220). That would be about 11:20. The sentry had a duty to ascertain to observe what was going on, to allow no one to pass without proper authority and to represent the commanding officer. (Basic Field Manual 193-194.) The Government having called this witness and vouched for his credibility, and which witness had the duty of observing what was going on, should have been bound by his testimony. If the Government doubted his credibility or accuracy they could have called the sentry who succeeded Wakeley on duty to ascertain as to whether or not Wakeley actually went off duty that night at 11:50 (R. 203). Sheila Dale and all of said complainant's witnesses were specific in stating that she got home at 12 o'clock and that it took 5 minutes to get from the scene of the offense to her home. If Wakeley actually saw the defendant entering camp some time prior to 10 minutes of 12, and considering it was five miles traveled up hill from the scene of the offense to the camp, the defendant could not have been the assailant.

Sgt. Pelletier was Smith's superior officer. He saw Smith shortly after the A. P. N. news bulletin, a U. S. Govern-

ment radio hookup in England. He saw the defendant enter shortly after 11 o'clock (R. 225-226). I recall the A. F. N. news [illegible] minutes later the B. B. C. came on" (R. 228). The A. F. N. news ended some time between 11 and 11:15 (R. 228) and the defendant came to the Sergeant's room less than 10 minutes after the A. F. N. went off the air (R. 226). The defendant requested the Court to take judicial notice the A. F. N. went off the air at 11:05 every night, which was refused. The T. J. A. refused to stipulate this fact although said information was readily available. The T. J. A.'s duties required him not to suppress evidence favorable to the defense and act inconsistent with a general desire to have the whole truth revealed (M. C. M. 41-d.) The Court ordinarily should have taken appropriate action with a view to obtaining such additional evidence as was necessary for such determination (M. C. M. Sec. 56, Page 58).

> "The defendant was entitled to be tried fairly." (*Hicks v. Hiatt*, supra.)

1st Sgt. Robert A. Hayes testified he saw the defendant at 11:30 to 11:45 in the kitchen mess hall (R. 231). He was positive as to his information (R. 232).

S Sgt. Edward R. LaPage said he saw the defendant in the mess hall between 11:45 and 11:30 (R. 233).

Sgt. Stanley T. Phelan saw Smith about 11:30 (R. 237).

The defendant was relying on an alibi. The complainants testified that he committed certain actions at a certain time. He conclusively demonstrated that he was not there at the time alleged. The reviewing authorities have indicated that the girls might have been mistaken concerning the time. If so, the testimony concerning the darkness as

taken from the official almanac is strong supporting evidence of the defendant's alibi.

Sheila Dale was characterized over the objection of the Government as a girl of bad reputation as to chastity (R. 238). Her testimony was accepted and the six soldiers' testimony was rejected. The Government accepted every statement made by Sheila Dale as being the absolute truth with the exception of her statement as to the time of the occurrence of the attack. On this they feel that she might be in error. That was the only subject which the defendant was able to attack. Having successfully controverted and defeated the issue of time the Government indicates that the time really was not of much consequence when, as a matter of fact, it was of tremendous importance.

10. The Government theory of the law in the case was erroneous.

The Government case started on the premise that the same person committed both crimes. Both cases were tried together with the same witnesses although they were two separate and distinct offenses, each one of which had to stand on its own facts. The evidence was intermingled to the point that the evidence was construed by the Court as cumulative and mutually corroborative. This was error. (Review of J. A. G., R. 51-52.)

Lt. Todd, as Provost Marshall, having convinced himself that the defendant was guilty and caused him to be committed to the guard house, made a report to his commanding officer concerning his findings. Of all the officers in the U. S. Army, only Lt. Todd was disqualified from being an impartial investigator. Todd admitted he had a dispute with Smith a short time previously (R. 31). The impartial

investigation was a matter of right, not a matter of convenience. Lt. Todd really made his investigation first as Provost Marshall, then using the same documents, papers and witnesses, made his report as impartial investigator.

Digest of Opinions of the J. A. G., supra;

Winthrop's Military Law and Precedents, supra.

11. Errors made by reviewing authorities.

Review of Staff Judge Advocate dated September 19, 1944. The first 3½ pages of this report are just a summary of the testimony of the two girl complainants. The reviewing authority did not miss any fact that would support the People's case. The testimony of 6 soldiers, including the sentry at the gate, was disposed of in 51 lines. "The record fully justifies the inference that she did not in fact consent" (R. 59-60). This statement is contrary to the evidence (Exhibit B, Pages 2, 3 and 4).

The record indicates that she did consent. She was not bruised or injured nor were her glasses knocked off.

The reviewing authorities attach great significance, as did Constable Felton and Lt. Todd, to the cut on the defendant's hand (R. 69).

> "There is also the corroborative circumstances of the scab from an incised wound on the accused's left hand at the spot where Miriam Cullum testified she bit him" (R. 69).

The accused explained this scab as resulting from a cut with a cleaver, but the Constable who examined it stated the scab was that from an incised wound rather than an abrasion or a cut. The word "incised" was used by the Trial Judge Advocate and Constable Felton. There was

never any mention of an abrasion. An incised wound is precisely the type of wound that would be caused by a cleaver. Webster's New International Dictionary defines "incised" as "to cut in or into with a sharp instrument, to carve, to engrave." That type of wound could not come from a bite with teeth. They also neglected the fact that she testified she hit his right hand, whereas the cut was on the left hand.

The defendant attempted to offer the scar of the wound in evidence at the hearing on the habeas corpus and the Trial Judge without examining the scar determined that it was not important and inadmissible. At the time of the hearing the scar could be seen as that of a straight line and a continuous cut (R. 26-27).

"The fact the attacks took place at the same place" (R. 69) was incompetent evidence and no proof against the defendant. The only emphasized point and underlined work in the entire review is the statement wherein Partyka, who was treated lightly, (the inference being that he was intoxicated at the time) stated that the defendant said he was with a girl that evening:

> "After he reached the station he was deliberately attempting to establish an alibi. In this connection it is to be noted that the accused testified he spoke to "all" the men in the mess hall that night and although his memory before 12 o'clock was exact he testified "there was no reason to remember the time after 12"" (R. 70).

The defendant was charged with two crimes which occurred between 10:45 and 11:45 P. M. He prepared his case on those grounds. He might not have been able to advise the Court as to where he was at any other given time

but as to the time of the alleged crime he made a detailed examination and preparation for the purpose of preparing his alibi. If it were necessary for him to establish where he was on any other occasions he should have been given the opportunity to prepare his defense.

> "The accused's conduct with respect to the gun on his hand two days later also suggested the purpose of establishing an alibi" (R. 70).

In that the reviewer is correct. An alibi if established is a complete and total defense. If he could prove he wasn't there and if he could further prove that the essence of the prosecutor's case, to wit: the lacerated hand, did not come from the bite of Miriam Culium, he should have been acquitted. However, the reviewer construes this undisputed testimony of Sgt. Pelletier and the defendant as being false merely because it conflicts with a desire to find the defendant guilty. The Sergeant testified he saw fresh blood running from the defendant's hand and dressed the would. No proof could be much more effective if it were true. Pelletier's credibility was not attacked.

The review of the branch office of the Judge Advocate General dated December 9, 1944.

> "Tall weeds had been broken down as if some person had been lying there" (R. 51).

There is no evidence in the case anywhere connecting up this evidence. This evidence was not binding on the defendant. Neither girl pointed out this spot to Constable Felton, according to the testimony in the case. It was not evidence and utterly irrelevant, immaterial and highly prejudicial.

"The time element in the two crimes complement each other and are in harmony" (R. 51).

This is no evidence against the defendant. This is one of the fundamental errors of the case. All prosecuting authorities construed both cases together, whereas each case had to rest on its own foundation. Perhaps the same man did commit both offenses. The defendant contends it was not he.

"The description given by Miriam of her assailant closely corresponds with the description given by Sheila" (R. 52).

These descriptions are of no value. Miriam Cullum identified the assailant as wearing an American uniform, riding a khaki colored bicycle and as the man who sat in the court room. The description of an American, wearing no stripes and riding a khaki colored bicycle could fit any enlisted man in the Army.

The J. A. G. Review stated: "Miriam bit her assailant on one of his hands (R. 53). R. 64 and 74 says "hand." Miriam's statement said "right hand" (Ex. B, Page 1). The wound was, in fact, on the left hand (R. 199). R. 75, referred to by the reviewer, was where they cross-examined Miriam as to the contradiction between her statement which said "right hand" and the fact, which was the left hand."

The J. A. G. erred in not appreciating the significance of Miriam's error. She bit a man on the right hand and because a man had a wound on the left hand he was convicted.

"The evidence is substantial and convincing that the same white American soldier committed the two crimes" (R. 51).

The following authorities have arrived at the above presumption by circumstantial evidence; they then erroneously concluded the presumption of the defendant was the assailant he committed [illegible]. This was error. U. S. v. Ross, 92 F. S. 261 (1950). Therefore, as a matter of law, the Judge Advocate General's Office has to a reversible error in the Review.

12. The Government has changed its theory in the case.

At the hearing at Lewisburg, Smith contended that the identification line-up was conducted by Todd on the evening of July 18th, four hours after he was first quizzed by Todd. Todd claimed that the line-up took place a week after July 18th, when he was acting as investigator under A. W. 70. The attorney for Smith requested in open court the date of the appointment of Todd as A. W. 70 investigator, and it was missing from the Government record (R. 36).

Counsel for Smith discovered the appointment while examining the record on the day of argument in the Court of Appeals, April 8, 1948. Todd was appointed investigator under A. W. 70 on July 20th, two days after the line-up was conducted and two days after he arrested Smith and took the last statement of the two complainants. The Government now admits substantially all of the defendant's contentions excepting they deny that Todd assisted or participated in the taking of the statements on July 18th at 7:45 after the line-up.

13. The defendant was denied counsel.

He was represented by an air corps officer. Two lawyers sat in as counsel, but they did not actively participate in

the case. The Government was represented by two members of the J. A. G. Staff, one of whom was the impartial investigator and Provost Marshall, Todd. The defendant was denied the protection afforded by the Constitution, which guaranteed him counsel, which meant competent counsel. This deprived him of his constitutional rights, especially in a case which involved the death penalty.

Johnson v. Zerbst, 304 U. S. 458, 467; 82 L. Ed. 1461, 58 S. Ct. 1019:

> "Petitioner, convicted and sentenced without the assistance of counsel, contends that he was ignorant of his right to counsel, and incapable of preserving his legal and constitutional rights during the trial. Urging that—after conviction—he was unable to obtain a lawyer; was ignorant of the proceedings to obtain a new trial or appeal and the time limits governing both; and that he did not possess the requisite skill or knowledge properly to conduct an appeal, he says that it was—as a practical matter—impossible for him to obtain relief by appeal. If these contentions be true in fact, it necessarily follows that no legal procedural remedy is available to grant relief for a violation of constitutional rights, unless the courts protect petitioner's rights by habeas corpus."

Walker v. Johnston, 312 U. S. 275, 286; 88 L. Ed. 830; 61 S. Ct. 574;

Williams v. Kaiser, 323 U. S. 476 477; 89 L. Ed. 65 S. Ct. 363.

14. Judge Follmer's decision was predicated on an erroneous statement of fact by the Government.

The Government at Lewisburg advised the Court that

Thus could not find the date of Todd's appointment as an impartial investigator till Judge Follmer decided the case without knowing what day Todd was appointed impartial investigator. Counsel took the photostatic in Philadelphia on April 7th, the date of argument, before the Court of Appeals found Todd's appointment as impartial investigator at Page 31 of the photostatic record (R. 90a). The date of this appointment was of utmost importance. It conclusively established that Todd had performed all the acts in the preparation of this case prior to his appointment as impartial investigator. Judge Follmer decided the case adversely to the defendant, believing Todd's testimony, to wit: that practically all of Todd's investigation of this case was made subsequent to his appointment under A. W. 70 (R. 90b). In that the record conclusively demonstrates that Todd was wrong in that he made his investigation as Provost Marshall not under A. W. 70, Judge Follmer was estopped from giving a decision in favor of the defendant. Had Judge Follmer been given the date of the appointment it would have changed the entire law of the case and undoubtedly changed his decision. The Judge believed Todd and said he believed him. Yet Todd was wrong.

The defendant requested the Government to provide a photostatic copy of every paper in the file. This request was denied by the Government on the ground that such information was confidential. At the Law Hour hearing counsel for the defendant requested the date of the appointment in question (R. 90) and he was advised that the date of such appointment was not in the file. On April 7th, 1948, in Philadelphia counsel for the defendant himself found the document.

15. Comments on Government's brief.

The Government admitted a number of errors which are of the greatest importance.

1. They admit that Todd erred as to the date of his A. W. 70 appointment (Brief, p. 39). Yet Todd testified that he was positive concerning this point. Justice Fullmer said he believed Todd.

2. The Government claims that the Cadum girl erred in her testimony wherein she stated she gave Todd her statement (Exhibit B) (P. 45). The girl was testifying under oath. Either she was testifying to the truth or she wasn't. She knew to whom she gave statements. Todd never denied this.

3. On P. 44, Gov't Brief, the Government claimed that Todd did not take a statement from Sheila Dale. The record shows that Sheila Dale gave but one signed statement. Todd testified at Page 36 *he took a statement from Sheila Dale and that she signed it and he authenticated same.* There is only one statement in the record signed by Sheila Dale.

4. The Government states that an investigation was in progress for a week by the C. I. D. but they accomplished nothing. It was Todd who discovered the defendant, quizzed him, arrested him, identified him, acted as impartial investigator and then as trial judge advocate. The Government refers to Todd's actions in this case as "a harmless error" (P. 30, Gov't Brief).

> "Impartiality means something more than complete ignorance of a matter." (P. 46, Gov't Brief.)
>
> "The investigating officer, unlike the grand jury

does not guide the investigation. He notes investigate further unless else has made it." (P. 55.)

The fact that Todd participated briefly in the preliminary investigation and could tell the line-up which resulted in the respondent's identification [illegible] (P. 11.)

All the work done by Todd in this case was under A. W. 24. He admitted he had had trouble with Smith once before.

1. It was this A. W. 24 investigation that apprehended Smith.

2. Todd personally arrested Smith.

3. Todd arranged for the line-up of Smith. Talked with Smith in guard house with Capt. MacGregor. Told Irongha MacGregor to protect Smith *from above*" (R. 32).

4. Todd returned him to the guard house after the line-up.

5. Todd took the statements from the girls after the line-up.

6. He made a report under A. W. 24.

He was then appointed impartial investigator under A. W. 70.

Under A. W. 70 he didn't bother to investigate because he was convinced Smith was guilty. He recommended a court martial. He then acted as Trial Judge Advocate. Todd was not in this case *directly* nor were the *cases being tried* one was *to appear at the other*. Smith was sentenced to life imprisonment. Todd acted as policeman, committing investigator, grand jury and prosecutor.

Todd's actions in this case are not what Congress intended when it prescribed that a thorough and impartial investigation should precede the filing of charges in serious cases.

16. The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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Supreme Court of the United States

GEORGE W. HUMPHREY, Warden, United States Penitentiary, Lewisburg, Pennsylvania,

Petitioner,

—*vs.*—

BERNARD W. SMITH.

No. 457, October Term, 1948

PETITION FOR REARGUMENT.

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F. N. SPAULDING LAW PRINTING CO., SYRACUSE, N. Y.

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No. 457, October Term, 1948

PETITION FOR REARGUMENT

The prevailing opinion in the above entitled proceeding decided April 25, 1949, was predicated largely on the decision of the case of *Floyd, CM 229477*. It will therefore be necessary to analyze this decision in order to point out the inconsistencies of that decision.

In the first instance the matter of *Floyd* expressly overruled the matter of *Clark, CM 161728*. The decision practically annulled Article of War 70 by declaring in substance that a pre-trial investigation was not jurisdictional. The *Floyd* case not only reversed well established and considered precedent by army courts martial and boards of review but practically annulled the statutory provision which was enacted by Congress in response to the demand of public opinion for protection of members of the service and

government against unnecessary and unjustifiable trials by court martial.

The arguments under the *Flood* case do not stand up under analysis. It presents an excellent array of all considerations tending to support its conclusions but ignores the opposite side of the picture. It is not a four-square judicial discussion of the question under consideration with recognition and unprejudiced evaluation of all of the various factors involved. It is the one-sided argument of an advocate seeking to sustain a preconceived proposition, marshalling only those matters favorable thereto and avoiding as far as practicable even the mention of anything adverse, citing authorities not in point and filling gaps in fact and logic with unwarranted assumptions and presumptions. For example, it fails to discuss or even mention any of the specific grounds upon which the overruled precedent opinions in the *Clark CM 161728; Keller, CM 182225;* and *Claybaugh, CM 183183* cases were based. True, the *Flood* opinion states that the holdings in the *Keller* and *Claybaugh* cases were not based on lack of jurisdiction but rather upon a theory that failure to comply with Article of War 70 was per se error, injuriously affecting the substantial rights of the accused, but as the Board in the *Flood* case remarked, the result is the same as in the *Clark* case and the reasoning of none of those three cases is disclosed.

The first point made in the *Flood* opinion in support of its conclusion that omission of pre-trial investigation pursuant to Article of War 70 does not affect jurisdiction is a statement that "the requirements for preference of charges and records of trial to staff judge advocates had theretofore been held to be directory only and to have no

effect on the legality of the proceeding." To that proposition the Board cited three prior opinions of the Board *CM 215720, Pool*; *CM 215721, Klobucker*, and *CM 224823, Greunebach*. Here again the *Floyd* opinion omits any statements on grounds of any of the cited opinions.

That a failure to refer charges to a staff judge advocate before ordering directed to trial was regarded as having at least some effect upon the legality of proceedings, is shown by the syllabus of *CM 224849*, where it was held that reference for trial by a service command order signed for the service commander by his staff judge advocate was insufficient to show compliance with Article of War 70.

It thus appears that the proposition to which the *Pool, Klobucker* and *Greunebach* cases are cited by the Board in the *Floyd* case is questionable. In fact, to the knowledge of the counsel for the defendant herein, Smith, none of these cases appear to have been published to the Service, which raises a still further and substantial doubt that they provide authentic support for the very important principles of military justice to which they are cited, for certainly those principles are such as should have been widely promulgated to all concerned with the administration of military justice. Those cases do not square with the provisions provided by the War Department's Technical Manual entitled "Military Justice Procedure, TM 27-225" and particularly par. 41, p. 37, which prescribes the duties of the A. W. 70 investigator in some detail as follows:

> "It is not the investigator's function to build up a case against the accused, but to ascertain and impartially weigh *all* facts in arriving at his final conclusions. He is required to conduct a thorough and impartial investigation" (A. W. 70). All available evidence should be exhausted. The investigating

officer is not limited to an examination of the witnesses and documentary evidence indicated on the charge sheet; he should extend his investigation as far as may be necessary to make it thorough."

And the same manual further prescribed (par. 42b, p. 38):

"b. At the outset, the accused should be advised that an impartial investigation of the charges is to be conducted. The nature of the charges, the name of the accuser, *and the names and substance of the testimony of all witnesses should be made known to him.*" (Emphasis ours.)

If these cases really do appear to provide such support as claimed by the War Department, then they must, in our opinion, be classified with the *Floyd* opinion itself, as being in the category of those opinions in which there has been a tendency to erroneously whittle away important statutory safeguards in order to serve what may have appeared to be the expediency of the moment.

In the *Floyd* opinion the Board further referred to the *Clark*, *Keller* and *Claybaugh* opinions aforesaid and declared that, although those cases had not been expressly overruled, opinions on analogous points indicated that the first three paragraphs of A. W. 70 had come to be regarded as directory only in all respects and that failure to comply therewith was not fatal error. Again these cases declared to represent that view and the Board cited a number of holdings which, with one exception, had not then and have not as yet, to the knowledge of counsel, been published to the service, the reasoning and grounds of which are not generally indicated and none of which in our opinion affords support for the proposition to which it is cited.

The first of the cases last mentioned is *CM 121586 (1918)* antedating the present Article of War by about two years, the syllabus of which indicates that the holding was substantially as stated by the Board in the *Floyd* opinion. That is, failure to swear a witness was not prejudicial error where the accused admitted the facts to which the witness had testified. Although Article of War 19 then as now expressly required that all persons giving evidence before a court martial be examined on oath or affirmation, that provision had to be read along with A. W. 37, which then as now expressly authorized reviewing authorities to disregard any error in the improper admission or rejection of evidence unless it should appear to have injuriously affected the substantial rights of the accused (MCM, 1917, App. 1, pp. 312-314) but the present test of A. W. 70 did not then exist, and there was no statutory requirement for pre-trial investigation such as now appears in mandatory terms in the second paragraph of that article. It should also be observed in that connection that A. W. 37 has no application to pre-trial procedure and affords no authority for disregarding a failure to comply with any requirement of A. W. 70. It follows, we think, that *CM 121586* gives no support whatever to the proposition to which it was cited in the *Floyd* opinion.

Next in support of that proposition the *Floyd* opinion cited *CM 172002, Nickerson*, where according to the citation it was held that a failure to sign or swear to the charges was non-prejudicial.

Failure of the accuser to sign or to swear to charges before their reference for trial by general court martial would, of course, be a definite violation of the plain terms of the first paragraph of A. W. 70, but it will be noted that that paragraph unlike the second and third paragraphs of

the article, does not expressly make compliance a condition precedent to reference for trial. In view of this important distinction the holdings in the *Nickerson* case can not logically be regarded as affording any substantial support for the conclusion reached in the *Floyd* case with regard to the second paragraph requirements.

The difference just noted between the language of the first paragraph of A. W. 70, on one hand, and that of the second and third paragraphs, on the other hand, furnishes convincing evidence that Congress in formulating that article deliberately distinguished in that way between those requirements of the article which the legislators intended to make outright jurisdictional conditions precedent to reference for trial and those which they may not have considered sufficiently vital in connection to warrant express provision for such treatment. The conclusion in the *Floyd* opinion would ignore that distinction and thus violate the well established rule that each part of the statute must be given its proper force and effect.

The use by the legislature of certain language in one instance and wholly different language in the other indicates that different results were intended and the courts have even so presumed. (*Guaranty Title & T. Co. v. Title Guaranty & S. Co.*, 224 U. S. 152, 159-160; *Crawford v. Burke*, 195 U. S. 176, 190.) Under this rule where language is used in one section of a statute different from that used in another section of the same statute, it is to be presumed that the language is used with a different intent. (*Mine v. Commonwealth*, 301 Mass. 451, 17 N. E. (2d) 545, 548.)

With relation to the *Nickerson* case citation, the author of the opinion in the *Floyd* case departed from his usual course of silence as to the reasoning of cited opinions by

quoting part of the *Nickerson* opinion in language called "apt," reading as follows:

> "The provisions of A. W. 70 requiring the charge and specifications to be sworn to, was intended for the benefit of the accused in order that he might not be subjected to frivolous or malicious prosecution and if he did not object to the irregularity and the accusation is sustained by the proof, the fact that the charge and specifications were not sworn to would not in itself injuriously affect any of the substantial rights of the accused."

The faults in such reasoning are so obvious as hardly to call for specific comment. It is of course true that the provisions of Article of War 70 were enacted in part for the benefit of the accused. So were many other provisions of the Articles of War which are in mandatory terms, and many of which have uniformly been held to be so. But it is equally true that those provisions were enacted for the benefit of the Government, to guard against the expense and other manifest disadvantages to the Government of unnecessary and unwarranted trials.

Furthermore, the right of an accused to know his accuser, is a fundamental and substantial right, expressly provided by law, and of great importance to both the accused and the Government in the administration of military justice. In our opinion it cannot legally be waived, but in any event, to hold that it can be waived by an accused by a mere failure to object, which might of course be due to ignorance or oversight, or by anything less than an express and definite declaration of the accused affirmatively shown by the record of trial, does violence both to the statute and the fundamental concepts of military justice. It would invite the

initiation of charges by anonymous accusers, by persons not legally eligible to so prefer charges, and persons unwilling to assume the proper responsibilities of accusers. It would facilitate the service of an undisclosed accuser as a member or official of the trial court. That these are among the very evils against which Article of War 70 was enacted, and to which the door will again be opened by failure to enforce the requirements of that Article, is apparent from the legislative history of the enactment, as outlined in our oral argument. We agree with the Board in the *Floyd* case, in its declaration that the reasoning in the *Nickerson* case applies with equal logic to the *Floyd* case; but we mean this in the sense that there is no sound logic in its application to either case.

Next after the *Nickerson* case, the *Floyd* opinion mentions *CM 201563, Davis*, where it was held that transmission of a report of pre-trial investigation by telephone, involved no violation of Article of War 70. The opinion is in the new compilation, and is correctly described in the *Floyd* case, but we can perceive no analogy between that holding and the proposition to which it is cited. The requirement that reports of pre-trial investigation be made in writing under certain conditions, is not in Article of War 70 or any other Article of War. It is merely a requirement of regulations.

Similar remarks apply to the *Godfrey* case citation (*CM 202511*), where if it is correctly described in the *Floyd* opinion, the holding apparently was simply that certain changes made in charges, by the staff judge advocate after pre-trial investigation, were not substantial and accordingly that the original pre-trial investigation constituted substantial compliance with Article of War 70. This is

manifestly quite different from, and provides no support for, the proposition that the Judge Advocate General had come to regard the pre-trial requirement as directory only.

And the last of the citations in support of that proposition was *CM 206697, Brown*. It is described in the *Floyd* opinion simply as "reference of charges to accuser for investigation," from which we infer that the holding was that such an error was not necessarily fatal. But here again the suggested analogy is absent, for Article of War 70 contains no express prohibition against such a reference, merely requiring that the investigation be impartial, and it is readily conceivable that a formal accuser might be capable of investigating his own charges impartially.

We must conclude that there is nothing substantial or authentic to support the secondary premise in the *Floyd* opinion, namely that although the *Clark*, *Keller* and *Claybaugh* opinions had not been expressly overruled, other opinions on analogous points indicated that the first three paragraphs of Article of War 70 had come to be regarded by the Office as directory only, and that failure to comply therewith was no longer regarded by the Office as fatal error.

In further support of its conclusion in the *Floyd* case, the Board next declared that that conclusion coincided with the apparent intention of the Congress in enacting the statute, which was, the Board asserted, "to prevent 'unnecessary and unjust trials' based 'on flimsy evidence without a prima facie case'," and cited certain Congressional Committee Reports of the 65th and 66th Sessions, and the Report of Special War Department Board on Courts-Martial and Their Procedure, dated July 17, 1919, disclosing parts of the legislative history of Article of War 70 as amended in 1920.

An examination of the entire legislative history of the enactment in question, and its language, will show that its ultimate full purpose was somewhat broader than indicated in the *Ex parte* opinion. It was clearly part of the ultimate purpose of Congress to prevent unnecessary and unjust trials by general courts-martial even where there might be a *prima facie* case. In other words, it is apparent that the Congress intended to give the accused in every such case a full pre-trial opportunity to meet and rebut a *prima facie* case.

More important in this connection, however, is the fact, obvious from the very language of the enactment as well as its legislative history, that the Congress thereby intended not merely to make provision under which those ultimate purposes *might* be achieved. War Department representatives were insisting that no new legislation was necessary at all in this connection, for the reason, as they contended, that the existing laws authorized all necessary action toward the desired ends and that those ends were already being effectively accomplished. However, there was then a strong popular demand for legislation that would more definitely assure attainment of those ends, some prominent proponents of such legislation even urging the radical extreme of complete withdrawal of court-martial jurisdiction and procedure from military command and control. The Congress decided on the middle course ultimately proposed by the War Department, and represented by the present text of the Article.

But, as above indicated, the Congress did not intend merely to declare or indicate its ultimate purposes of avoidance of unnecessary and unjust trials, leaving the measures for the accomplishment of its purposes to be devised and

pursued or ignored at the discretion of executive officials, but intended as far as practicable to assure their accomplishments by prescribing in mandatory terms, as statutory conditions precedent to the reference of charges to a general court-martial for trial, those specific measures deemed essential to the achievement of the desired ends.

It follows that the statement in the *Eloud* opinion that its conclusion (to the effect that the requirements of Article of War 70 for pre-trial investigation are not mandatory) coincides with the apparent Congressional intention in enacting the statute, as indicated by the pertinent legislative history, finds no support whatever in the documents expressly cited, or elsewhere; and is in fact completely erroneous.

Next in the *Eloud* opinion, the Board declares that the requirements of Article of War 70 are wholly procedural and do not affect the processes of courts-martial in their determination of guilt or innocence. We think the last clause of this proposition is a bit too broad, for certainly what transpires during a pre-trial investigation, particularly where the witnesses are thoroughly examined, and the accused is permitted to and does fully exercise his rights of cross-examination, may very vitally affect the proceedings of the court-martial at the trial. Disregarding that factor, we fail to perceive any proper relation between the statement and the question being considered. It is true that many procedural statutes are not regarded as mandatory or jurisdictional. But it is equally true that many are so regarded and treated. To classify Article of War 70 as procedural, as a means of supporting an argument that it is not mandatory or jurisdictional, is merely begging the question. No one will contend that the Congress lacks

power to make a procedural statute mandatory, or that it has done so in many instances. For examples, Articles of War 4, 5, 6, 8, 9, 10 and 11, may all be classed as procedural, in the same sense in which we presume that term is applied to Article 70 in the *Floyd* opinion, and certainly those prior Articles do not any more than Article 70 affect the processes of courts-martial in the determination of guilt or innocence; yet no one will argue that strict compliance with the provisions of each of those Articles is not mandatory and jurisdictional.

The Board's argument in the *Floyd* case proceeds with a declaration that although the language of a statute is mandatory, it may be regarded as directory if the legislative purpose can best be carried out by such a construction. This is perhaps a correct particularization of the basic rule that the legislative intent governs the construction of a statute. We do not challenge the soundness of the rule, but do challenge its applicability in support of a directory construction of the mandatory language of the second paragraph of Article of War 70.

There are other equally well established rules of statutory construction that must be taken into consideration. One is that a statute is to be construed according to the customary meaning of its words unless a different intent is clearly demonstrable. From this it necessarily follows that the proponent of a directory construction of a statute which is expressed in mandatory language, has the burden of showing in some convincing way the contrary legislative intent essential to the establishment of his proposition.

Neither in the *Floyd* opinion, nor in the present case, is any such showing made. The fact upon which the author of the *Floyd* opinion apparently relied, and upon which

opposing counsel in this case apparently rely, in support of their contention, is that the ultimate purpose of the enactment was to prevent unnecessary and unjust trials by general court martial. To draw any support for their contention from that fact, it would be necessary, under the very rule cited in the *Lloyd* opinion, to go further and demonstrate in some convincing way that the achievement of that purpose could be better and more certainly assured by construing the mandatory statute as only directory, or, in other words, by leaving compliance with the specific requirements of the statute more or less discretionary, and permitting the approval of sentences imposed after trials conducted without compliance with those requirements. Of course such a demonstration would be impossible, for it is too manifest that the best and surest way of assuring accomplishment of the purpose of Article of War 70 is to enforce its mandatory terms strictly and literally as they were enacted. Furthermore, as has already been pointed out, the legislative history of the measure proves with more than usual clarity that such enforcement was in fact the deliberate and well considered intent of the Congress.

The author of the *Lloyd* opinion next claims some support for his conclusion that the Congress did not mean what it said in Article of War 70, in certain cited opinions of the United States Supreme Court holding that some of the guarantees of the Fourth, Fifth and Sixth Amendments are in the nature of personal privileges that may be waived. We need not discuss or consider those rulings in detail in this connection, because of the obvious distinctions between those Federal Constitutional provisions, derived largely from, and construed largely according to the English common law, on the one side, and on the other, the second paragraph of our Article of War 70, with its

positively mandatory language, so enacted by the Congress under circumstances clearly indicating a deliberate legislative intent to make compliance with those requirements a statutory condition precedent to valid reference of charges for trial by general courts-martial.

We invite special attention to the language of the United States Supreme Court, speaking through Mr. Justice Sutherland in the *Patton* case (from which the *Floyd* opinion quotes other parts), where, after holding that the right of trial by jury under the English common law was, and therefore is under our Federal Constitution, likewise a matter of personal privilege subject to waiver, the Court was careful to add (*Patton v. United States*, 281 U. S. 276, 312):

> "In affirming the power of the defendant in any criminal case to waive a trial by a constitutional jury and submit to trial by a jury of less than twelve persons, or by the court, we do not mean to hold that the waiver must be put into effect at all events. * * * Not only must the right of the accused to trial by a constitutional jury be jealously preserved, but the maintenance of the jury as a fact finding body in criminal cases is of such importance and has such a place in our traditions, that, before any waiver can become effective, *the consent of the government counsel and the sanction of the court must be had, in addition to the intelligent consent of the defendant.* And the duty of the court in that regard is not to be discharged as a mere matter of rote, but with sound and advised discretion, with an eye to avoid unreasonable or undue departures from that mode of trial or from any of the essential elements thereof, and with a caution increasing in

degree as the offenses dealt with increase in gravity." (Emphasis ours.)

And it should be noted in the same connection that nowhere in the Articles of War, or in the Manual for Courts-Martial, is there any provision, express or implied, authorizing an accused or a trial judge advocate, to waive the pre-trial investigation required by Article of War 70, or authorizing any court martial to accept such a waiver.

Finally in the *Flood* opinion, after announcing a ruling in that case conforming to the conclusion previously stated, that the pre-trial investigation requirement was not jurisdictional, and further holding that the failure to comply therewith in that case did not injuriously affect the substantial rights of the accused there, the Board quoted from what it styled "a penetrating review by the staff judge advocate in the Brown case" (supra), as follows:

> "If * * * a thorough and impartial investigation is not had, (and) nevertheless the charges are referred for trial, a fair trial is had which results in conviction, and the sentence is approved; all that the accused has suffered is *injuria sine damno*, a technical WRONG WHICH DID HIM NO HARM. The law ought not to admit that a guilty man is barred if tried, convicted and sentenced; and if he has had a fair trial and has been convicted, the law, if it does not stultify itself, must assume him to have been found guilty. The case therefore falls within the exact language of A. W. 37; * * * It was no part of the purpose of the authors of A. W. 70 to prevent the trial, conviction and punishment of a guilty man."

The preposterous sophistry of those "penetrating" remarks becomes glaringly apparent when we reflect that the same things might be said with relation to the otherwise fair and valid trial, conviction and sentence of an obviously guilty man by a court-martial subsequently held to have been wholly without jurisdiction on any one of the many technical but well settled grounds other than failure to comply with Article of War 70, upon which the proceedings and sentences of courts-martial have uniformly been disapproved as null and void *ab initio*.

For example, let us suppose that an accused has been tried by general court-martial with the most meticulous fairness, on grave and valid charges, convicted on competent evidence so convincing as to leave no doubt whatever of his guilt; but after receipt of the record of trial by the convening authority, it is discovered that the authority was not lawfully empowered to appoint the court. Perhaps our ingenious and penetrating reviewer of the *Brown* case could save that record also by reasoning that it was no part of the purpose of the Congress in enacting Article of War 8 to prevent the trial, conviction and punishment of a guilty man; *cry* that that Article likewise is not mandatory, and since the man is obviously guilty he has suffered only "injuria sine damno," so the sentence may be approved.

Ultimately, by extension of the same logic, we might get away from many other exacting restraints of the Articles of War.

Before leaving this interesting last phase of the *Hood* opinion, we desire to express a partial concurrence in the final statement quoted from the *Brown* case reviewer, that it was no part of the purpose of the authors of Article of

War 70, to prevent the trial, conviction and punishment of guilty men. We think it was the purpose of the Congress to prevent the unnecessary trial by general court-martial of even guilty men, i. e., where the offense is relatively minor and the case can be more wisely disposed of in some one of the other authorized ways. In the larger sense, however, we agree that the Congress had no intention whatever of preventing the trial and punishment of guilty men. But the implication of the staff judge advocate's statement as quoted in the *Flood* opinion, to the effect that the requirements of Article of War 70, if construed literally, and held mandatory, would prevent the trial and punishment of men guilty of offenses for which trial by general court-martial should be required, is wholly unreasonable and untenable. All that full compliance with the literal terms of the Article prevents in such cases is snap judgment on the question whether trial is or is not the proper action. The way to trial, conviction and punishment is left wide open, subject only to wise provisions to assure that it shall not be used unnecessarily and unwisely.

It must be remembered that the only pre-trial function wherein a soldier defendant has any rights whatsoever is under Article of War 70. If A. W. 70 means nothing, then a citizen who is a member of the United States Army must go before a court-martial which, in practice at least, is subject to the General or other in command, wherein the penalty, as in the case at bar, is death, and convictions are frequently had not because the defendant was guilty but in order to make an impression on the other men.

Justice Jackson said on the occasion of the argument of this case that he never would have found the defendant guilty on the evidence in the record. In the case at bar

the defendant was found guilty not because he was guilty but in order to impress the other men with the seriousness of the situation that existed between British civilians and American soldiers.

It never was the intention of Congress to provide naked rights for the members of the Army, which were rights in theory only, and which rights conferred in fact no privilege or right upon the soldier.

All courts have conceded that A. W. 70 was jurisdictional up to the decision in this case.

It was found as a matter of fact by the Court of Appeals that the investigation under A. W. 70 was neither thorough nor impartial. These were fundamental and basic failures to give the defendant soldier a substantial portion of his day in court. A member of the judge advocate staff in accordance with A. W. 8 was not on the bench although one was available to act as prosecutor. The defendant was represented by an air corps officer who was not skilled in law, at the trial of a capital offense, the penalty of which was either death or life imprisonment. The most important witness in the case was absent. There was no corroboration as to identity. There is serious question as a matter of law as to whether or not a rape occurred. Todd, the impartial investigator, acted in various capacities including arresting officer, committing magistrate, grand jury and, by a strange coincidence, in 1947 was attached to the Clemency Board of the army.

This case was briefed, presented and argued on the theory that A. W. 70 was a valid statute. The respondent respectfully prays that an opportunity be afforded to further brief and reargue the case on the issue as to whether

or not A. W. 79 is jurisdictional. The Government's brief in this case, while it calls the Court's attention to the fact that A. W. 79 was not jurisdictional, it was not seriously briefed, argued or entertained by any of the courts previously.

The defendant should be permitted to thoroughly brief and argue the merits of whether A. W. 79 is jurisdictional.

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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